Petition

81-374

Office-Supreme Court, U.S.
FILED
AUG 26 1981
ALEXANDER L. STEVAS,
CLERK

No.

In The

Supreme Court of the United States

OCTOBER TERM, 1981

THE CITY OF BRIDGEPORT, ET AL
Petitioners-Defendants,

vs.

ASSOCIATION AGAINST DISCRIMINATION
IN EMPLOYMENT, INC., ET AL
Respondents-Plaintiffs,

AND

BRIDGEPORT FIREFIGHTERS FOR MERIT
EMPLOYMENT, INC., ET AL
Respondents-Intervenor Defendants.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petition For Writ of Certiorari
To The United States Court of Appeals
For The Second Circuit

QUESTIONS PRESENTED

1. Can a public employer, bound by Civil Service Charter testing requirement, be held liable for discriminatory hiring which occurred no later than May 2, 1973, when the plaintiffs filed their discrimination charge in October 1975 as a result of a completely different test which was taken by them on March 22, 1975?

2. Have the trial court (District Court—Connecticut) and the appellate court (Second Circuit Court of Appeals) abused their judicial discretion in fashioning remedies for employment discrimination when

   (a) they based their hiring quota and the back pay awards on the post discriminatory test hiring of Firefighters which had been agreed upon by all the parties and approved and ordered by the District Court? (This is referred to as the Interim Hiring Orders.)

   (b) they ordered hiring of minority Firefighters without allowing any testing device to be developed that would be job related and constitute a qualifying factor?

   (c) they ordered a 100% hiring quota?

   (d) they ordered a 100% freeze on promotions to Pumper Engineer and Lieutenant?

3. Is not this case involving a municipal Firefighter hiring test the proper case to review the proper scope of remedies for employment discrimination as set down in the Supreme Court decision of *Albermarle* v. *Moody?*

PARTIES

The parties are as follows:

CITY OF BRIDGEPORT, NICHOLAS PANUZIO, ROBERT W. WEEKS, JR., EDWARD F. DALEY, JULIUS NOBILI, WILLIAM G. PJURA, FRANK J. DEPRINZIO, ALAN COHEN, BRIDGEPORT CIVIL SERVICE COMMISSION, CHARLES E. PORZELT, ANDREW GOTTFRIED, SALVATORE S. SPADACCINO, CHARLES J. DOUGIELLO, JOHN J. HANNON, JOHN F. GLEASON, DAVID SULLIVAN, WILLIAM D. MIKLUS, ALBERT SCHWARZ, BRIDGEPORT BOARD OF FIRE COMMISSIONERS, individually and in their official capacities

PETITIONERS-DEFENDANTS

VS.

ASSOCIATION AGAINST DISCRIMINATION IN EMPLOYMENT, INC., ROOSEVELT JOHNSON, CRAIG KELLY, CHARLES HERD, ROBERT LEWIS, WILLIAM CARY, CHARLES R. YOUNG, HERMAN AGOSTO, HARMIN LINARES, ISMAEL POMALES, SALVATORE PEREZ, and on behalf of all other similarly situated,

RESPONDENTS-PLAINTIFFS

And

BRIDGEPORT FIREFIGHTERS FOR MERIT EMPLOYMENT, INC., JOSEPH DICARLO, THOMAS NAPLES, PHILIP LYNCH, BRUNO BRESSIE, THOMAS O'CONNELL, FRANK G. BENDER, and ROBERT B. ANDERSON.

RESPONDENTS-INTERVENORS-DEFENDANTS

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	vi
OPINION AND JUDGMENT BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE PETITION	13
ARGUMENT	15
I. AS TO LIABILITY — THE CIRCUIT COURT DECISION ILLEGALLY INCLUDES TEST TAKERS BARRED BY THE 300 DAY STATUTE OF LIMITATIONS RULE AND IS IN DIRECT CONFLICT WITH SUPREME COURT CASE, *UNITED AIRLINES* V. *EVANS*	15
II. AS TO REMEDIES — THE COURT DECISION CONSTITUTES A TOTAL ABUSE OF JUDICIAL DISCRETION AND IS IN CONFLICT WITH SUPREME COURT PRINCIPLES OUTLINED IN *ALBERMARLE* V. *MOODY*	16

Page

A. AN AGREEMENT OF THE PARTIES APPROVED AND ORDERED BY THE COURT FOR INTERIM HIRING IS *NOT* EMPLOYER DISCRIMINATORY HIRING BUT THE COURT USED THIS HIRING AS A BASIS FOR ITS HIRING ORDER AND BACK PAY AWARD 16

B. THE COURT HAS ORDERED HIRING OF MINORITIES WITHOUT THE NEED OF *ANY* TEST WHICH WOULD DISTINGUISH QUALIFIED FROM UNQUALIFIED APPLICANTS 21

C. THE COURT HAS ABUSED ITS DISCRETION IN AWARDING BACK PAY IN THIS CASE 23

D. THE 100% HIRING QUOTA AND PROMOTIONAL FREEZE CLEARLY EXCEEDS THE LOWER COURT'S REMEDIAL AUTHORITY AND IS CONTRARY TO SUPREME COURT OPINIONS..... 25

CONCLUSION 29

APPENDIX — BOUND SEPARATELY

VOLUME ONE
APPENDIX A.

Association Against Discrimination In Employment, Inc. v. *City of Bridgeport*, ____ F.2d ____, Slip Op. 6931 (April 8, 1981) 1a-69a

Page

VOLUME TWO
APPENDIX B.

Association Against Discrimination In Employment, Inc. v. *City of Bridgeport,* 479 F.Supp. 101 (D.Conn. 1979) 70a

APPENDIX C.

Association Against Discrimination In Employment, Inc. v. *City of Bridgeport,* 594 F.2d 306 (2d Cir. 1979) 104a

APPENDIX D.

Association Against Discrimination In Employment, Inc. v. *City of Bridgeport,* 454 F.Supp. 751 (D.Conn. 1978) 119a

APPENDIX E.

Association Against Discrimination In Employment, Inc. v. *Weeks,* 454 F.Supp. 758 (D.Conn. 1978) ... 131a

TABLE OF AUTHORITIES

Cases	Page
Albemarle Paper Co. v. *Moody*, 422 U.S. 405 (1975)	14,16,24
Carter v. *Gallagher*, 452 F.2d 315 (8th Cir. 1971), cert. denied 406 U.S. 950 (1972)	27
EEOC V. *Enterprise Ass'n. Steamfitters Local 638*, 542 F.2d 579 (2d Cir. 1976), cert. denied 430 U.S. 911 (1977)	24
Franks v. *Bowman*, 424 U.S. 747 (1976)	27
Griggs v. *Duke Power Co.*, 401 U.S. 424 (1971)	21
Hazelwood School Dist. v. *United States*, 433 U.S. 299 (1977)	27
Kirkland v. *New York State Dep't of Correctional Services*, 520 F.2d 420 (2d Cir. 1975), cert. denied 429 U.S. 823 (1976)	26
Loving v. *Virginia*, 388 U.S. 1 (1967)	26
Molybdenum Corp. of America v. *EEOC*, 457 F.2d 935 (10th Cir. 1972)	15
Pettway v. *American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974), cert denied 439 U.S. 1115 (1979)	24
Regents of the University of California v. *Bakke*, 438 U.S. 265 (1978)	26
United Air Lines, Inc. v. *Evans*, 431 U.S. 553 (1977)	13,15,16
United Steelworkers v. *Weber*, 443 U.S. 92 (1979)	22,27

Page

Constitution and Statutes

Constitution of the United States
Fourteenth Amendment
Equal Protection Clause 1

42 U.S.C. § 2000e-5 (e) 3

OPINION AND JUDGMENT BELOW

The opinion of the United States Court of Appeals for the Second Circuit, which is the subject of this writ of certiorari is reported at 647 F.2d 256 (2nd Cir. 1981), decided April 8, 1981, and is printed as Appendix A. The opinion of the District Court for the District of Connecticut, on remand from the first appeal is reported at 479 F.Supp. 101 (D.Conn. 1979) decided August 24, 1979 and printed as Appendix B. The opinion of the United States Court of Appeals for the Second Circuit on the first appeal is reported at 594 F.2d 306 (2nd Cir. 1979) decided February 23, 1979 and printed as Appendix C. The original opinion of the United States District Court for the District of Connecticut is reported at 454 F.Supp. 758 (D.Conn. 1978), decided August 24, 1979 and is printed as Appendix D.

JURISDICTION

The opinion and judgment was entered on April 8, 1981. A timely petition for rehearing and rehearing en blanc was filed by the Petitioners City of Bridgeport, et al (Defendants-Appellants below) and was denied on May 29, 1981.

Jurisdiction of the District Court was based on 42 U.S.C. § 2000e-5(f).

Jurisdiction to review the judgment in question by writ of certiorari is conferred by Title 28 U.S.C. Sec. 2101(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The United States Constitution
   Fourteenth Amendment
   Equal Protection Clause

2. Statutes

Title VII, Civil Rights Act of 1964, Section 703(h), 42 U.S.C. § 2000e-2(h)

(b) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin; nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended, or used to discriminate because of race, color, religion, sex, or national origin. It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of Section 6(d) of the Fair Labor Standards Act of 1938 as amended (29 U.S.C. 206(d)).

Title VII, Civil Rights Act of 1964, Section 703(j), 42 U.S.C. § 2000e-2(j)

(j) Nothing contained in this title shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in

comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

Title VII, Civil Rights Act of 1964, Section 706(g), 42 U.S.C. § 2000e-5(g)

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

Title VII, Civil Rights Act of 1964, Section 706(e), 42 U.S.C. § 2000e-5(e)

(e) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an

unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

STATEMENT OF THE CASE

Present Status Of Lawsuit:

In this proceeding, originally commenced by a lawsuit dated September 2, 1975, the City of Bridgeport and various of its officials have been found liable for employment discrimination under 42 U.S.C. Section 2000 et seq. (Title *VII*). The City of Bridgeport has been ordered to immediately offer to hire 73 hispanic and black males to its Fire Department as entry level Firefighters; the City has been further ordered to make back pay awards to 73 hispanic and black males in amounts constituting what present Firefighters made with all fringe benefits including overtime (less actual earnings, unemployment compensation and welfare payments) retroactively to October 1973 and October 1976 and possibly later in some instances; such back pay awards are dependent on whether the hispanic or black who applied, or who would have applied, took the 1975 examination for Firefighter, or who took, or would have taken, the 1971 examination for Firefighter; the City of Bridgeport was further ordered to make *NO* promotional permanent appointments to the ranks of Pumper Engineer and Lieutenant (the only positions available to be competed for by Firefighters) until such time as all the hispanic and black hirees under the Court order could legally compete for these positions. (At the present time, a three year requirement as a Firefighter is necessary to compete for these positions.)

The Parties In This Lawsuit:

The Petitioners are the City of Bridgeport and various individuals who are officials of the City of Bridgeport all of whom it is claimed are responsible for or played a part in the hiring of Firefighters for the City of Bridgeport.

The Respondents are hispanic and black males who took the 1975 Firefighter examination conducted by the City of Bridgeport or who claimed that they were unable to compete in that examination. The plaintiffs also include a non-stock corporation that claims it is set up for the purpose of remedying wrongs perpetrated against minorities.

There is also an organization called Bridgeport Firefighters For Merit Employment who are Intervening Defendants in this action. They consist of various white Firefighters presently employed by the City of Bridgeport.

Hiring For Firefighters In The City Of Bridgeport:

Entry level hiring and all promotional advancement in the Fire Department, as well as in the Police Department, and in most other City departments is controlled by the Civil Service Charter of the City of Bridgeport which was adopted in 1935. It requires all of these positions to be filled by so-called merit selection which includes among other requirements the passing of a written test for appointment consideration. All written examinations are numerically scored and for entry level purposes, the written test is the real determiner of who is hired. The only factor that would further effect hiring is whether the applicant is a veteran with prior service with the Armed Forces of the United States. If qualified in that respect, he has five points added to his score and if qualified as a disabled veteran, he has ten points added to his score. Appointments are made according to the highest scorer on the employment list. No one in the Fire Department since 1936 has ever been hired except in that fashion, that is up until the present litigation. The successful candidates from the written examination must also pass a physi-

cal agility test and medical exam. To compete in the written exam they must have a high school diploma or equivalency certificate, have a driver's license and be a resident of Bridgeport.

In 1971, the last of the so-called standard written tests for Firefighter was administered and a ranking list promulgated. Twenty-eight persons were hired from that list after March 24, 1972 with the last appointment being made on May 2, 1973.

The 1975 Hiring Test:

With the amendment to the Civil Rights Act of 1964, which made municipalities subject to this Act and which became effective March 24, 1972, and with the experience involved in a Bridgeport Police hiring lawsuit which pointed out the deficiencies of the standard testing method as far as disparate impact on minorities is concerned, the City of Bridgeport and its Civil Service office attempted to avoid future hiring problems for the Fire Department. As a consequence, Bridgeport joined with nine other Connecticut communities to hire Hay Associates, an alleged nationwide firm with testing experience, at a cost of $100,000, federally funded dollars for the purpose of devising a nondiscriminatory job related test for Firefighter.

The test was put together after claimed thousands of hours work by Hay Associates and administered on March 22, 1975 in Bridgeport to 771 applicants, 110 according to subsequent data obtained during the trial of this case consisting of minority applicants. Originally, the race or ethnic background of the applicants was unknown because apparently the application form contained no requested data on that topic. In any event, the test was given. The Civil Service office, without consultation with the testing firm, Hay Associates, established a passing score of 12. This figure represented the 75th percentile grade of those who took the test. The actual requirements of the civil service law, which is part of the basic Charter of the City of Bridgeport, calls for all applicants for positions with the City that require testing, which is most of the positions except for laborers, etc., to achieve a 75% grade in order to be included on

the subsequent employment list. Apparently, Civil Service was unable to figure out what a 75% mark equaled so they used this percentile factor.

It should be noted, however, that during the trial of the case, Hay Associates testified that if they had been consulted about the applicant passing score for the test, they would have used the figure of 6 as a passing grade, which would have distinguished a qualified from an unqualified candidate. It should be further noted that the scoring of this exam was not in the traditional way and that the exam results actually had minus scoring.

The Start Of The Lawsuit:

In 1975 when the test was scored, the Civil Service office certified the list of those who scored 12 or higher which included 192 of the applicants, 184 white and 8 minorities. (There were persons on the list who were not originally identified racially.) The plaintiffs commenced their Federal District Court lawsuit on September 2, 1975 claiming 1981, 1983 and Title *VII* violations. The case was tried as a disparate impact case. It was not tried as a pattern and practice discrimination case. The District Court (Daly, Judge) found that the test results using the passing grade established by the Civil Service Commission resulted in disparate impact as regards to blacks and hispanics and further found after a great deal of testimony pro and con that the examination was not job related (the issue of exclusion of women from this test was not litigated).

Actual Hiring In Bridgeport Fire Department Prior To March 24, 1972:

Prior to March 24, 1972, the effective date of Title *VII* as far as municipalities is concerned, the City of Bridgeport hired every single Firefighter as a result of a written civil service test. This goes back to the implementation of civil service in Bridgeport in 1935.

Hiring Between March 24, 1972 And September 2, 1975:

During this period of time, the City of Bridgeport hired 28 Firefighters from a civil service list and test that had been given in 1971. The last Firefighter hired in this period was on May 2, 1973. No one else was hired after that date.

Hiring By The City Between September 2, 1975 And July 4, 1981: (The Period Since The Lawsuit Was Commenced):

On August 24, 1976, by an agreement of the parties in this lawsuit and reflected in an order of the District Court, Newman, J. dated September 1, 1976, conditional hiring was agreed upon and approved by the Court. This resulted in the hiring of 40 Firefighters from the 1975 examination list results.

On June 13, 1977, as a result of a further agreement among the parties to this lawsuit and with the approval of the District Court, Zampano, J., conditional hiring was agreed upon and approved to be accomplished from the 1975 exam list results. As a result of this agreement, 44 additional Firefighters were hired.

These 84 Firefighters were given permanent positions with the City of Bridgeport; 81 of these Firefighters were white and 3 were minority candidates. All of them received their positions by being offered the job in the usual fashion depending upon the results of their individual scores on the 1975 test, highest first.

On October 1, 1979, acting on a motion filed by the City of Bridgeport, additional hiring was approved by the District Court, Daly, J. As a consequence of that order, 20 more firemen were hired by the City; 13 were minorities and 7 were whites. These persons were also hired as a result of the 1975 examination list with the offers for the position being made to the minorities based on the highest scores achieved by the minorities who scored at least 6 on the 1975 exam. In 1981 under a similar approved agreement by the District Court,

Daly, J., 9 more Firefighters were hired, 6 minorities and 3 whites.

The City of Bridgeport has now offered a position as a Firefighter to every identified minority who took the 1975 examination who scored 6 or higher on that test. (6 was the figure established by Hay Associates in the course of the trial of the case which in their opinion representing a qualifying score for their examination.)

Therefore, the total number of Firefighters hired from the 1975 test list since the commencement of the lawsuit is 123, 91 whites and 22 minorities.

POPULATION, LABOR FORCE AND HIRING STATISTICS

The 1970 Census figures show a minority population of 17.3%.

In 1971, minorities constituted 23% of Bridgeport's labor force according to plaintiffs' own exhibit. Plaintiffs claimed, however, in another exhibit that 41% of the labor force in Bridgeport in 1975 consisted of male minorities. In a further exhibit introduced by the plaintiffs the minority representation among high school graduates in Bridgeport in 1975 was 15.2%. It should be noted that a high school diploma or a high school equivalency certificate was a requirement for participation in the testing process for Firefighter and that that issue was not contested by the plaintiffs in this lawsuit.

The 1975 test included 771 applicants, 110 of whom were subsequently identified as minorities and this constituted 14.3% minority applicants taking the examination. The actual candidates that now have been hired from the 1975 examination consists of 123 Firefighters, 22 of whom are minorities which constitutes a 19.5% participation in the hirings by minority males.

The actual number of fire fighting personnel presently employed by the City of Bridgeport is 345 men; this is 51 below the minimum authorized strength of the department, 75 below the budgeted strength of the department for 81-82 year, and 127 below the maximum authorized strength of the department. There are 321 whites and 24 hispanic and black men.

Brief History Of Lawsuit:

When the plaintiffs commenced their lawsuit on September 2, 1975, they claimed violations of 1981, 1983 and Title *VII*. In February of 1976, the plaintiffs by amendment added a claim for violation of Title *VI* and a violation of the Revenue Sharing Act. In their claims for relief, they asked for injunctions against hiring as a result of the non-job-related test and they asked for back pay, money damages, punitive damages, counsel fees and other equitable considerations like seniority consideration, etc.

On January 21, 1976, the plaintiffs filed a motion for preliminary injunction but this motion was never acted upon. On July 13, 1971, the plaintiffs filed a further motion for a preliminary injunction and also for a temporary restraining order but this motion was never acted upon. On August 24, 1976, the plaintiffs and the defendants which now included the intervening white Firefighters made an agreement in connection with interim hiring and this was approved and ordered by the District Court, Newman, J. On June 13, 1977, a further agreement was made between all of the parties to the lawsuit concerning additional hiring and this was approved by the District Court, Zampano, J. On September 16th plaintiff filed motions to withdraw its 1981 and 1983 claims and its claims for compensatory and punitive damages. On September 19, 1977, the plaintiffs filed a motion to strike the case from the jury trial list. On October 3, 1977, plaintiffs' motions to withdraw their claims and to strike from the jury list were granted by the District Court, Daly, J. On October 7, 1977, plaintiffs' motion for separate trials relating to liability and remedy was filed and granted by the District Court. On October 25, 1977, the court trial commenced before

Daly, J. and continued intermittently until December 1, 1977. This trial was limited to the issue of liability.

On July 14, 1978, the Court found that the defendants had violated Title *VII* and the Revenue Sharing Act in that the 1975 test upon which the department's hiring was based had an adverse impact upon minorities and was not properly job related. In a separate ruling on September 14, 1978, the District Court ordered a broad quota hiring as well as seniority and back pay relief in favor of the plaintiffs and the defendants appealed to the Second Circuit Court of Appeals.

In September and October of 1978, the City of Bridgeport attempted to settle this case but the monetary demands of the plaintiff were too great.

On February 23, 1979, the Second Circuit Court of Appeals remanded the case back to the District Court for further consideration. Judge Feinberg writing for the Court found the record in the District Court insufficient to support the sweeping remedy ordered and that the District Court had failed to address:

1. Recent Supreme Court and Second Circuit Court decisions on quotas.

2. The effect of certain of the District Court's Interim Hiring Orders.

3. The effect that rescoring the City's test might have on the disparate impact which was found.

The Second Circuit of Appeals also strongly suggested that the lawsuit should be settled.

After remand, the City of Bridgeport requested that settlement attempts be initiated and the District Court, Daly, J. called a conference. Objection was made to Daly participating in the settlement conferences and plaintiffs refused to have set-

tlement negotiations transferred to any other District Judge in Connecticut. The monetary demands of the plaintiffs were still too great for the City of Bridgeport to cope with and settlement negotiations failed. The District Court, Daly, J. then conducted very limited hearings on June 6th and July 17, 1979 in connection with the directions from The Second Circuit Court of Appeals on remand.

On August 24, 1979, the District Court rendered its second decision in this case which expanded the liability claims to include Title *VI* violations as a result of hiring done based on the 1971 exam. The District Court also expanded the remedy order that it had previously granted in its first decision. The District Court now granted relief to 102 minority applicants for Firefighter positions from the 1975 and the 1971 exams. It also granted relief to minorities who might come forward to claim that they were afraid to take the 1975 or 1971 exam because the City of Bridgeport had a bad reputation as far as employment is concerned. The hiring scheme for these 102 minorities constituted a 100% hiring quota. The District Court also awarded back pay to 102 minorities who were discriminated against because of the 1975 or 1971 exams. The back pay award was to include even people who did not accept the positions with the Fire Department that might be offered and was to include minority males who could satisfy the Special Master that they would have taken the 1975 or 1971 exams but they thought it was useless.

On September 12, 1979, the City of Bridgeport filed its Notice of Appeal from Judge Daly's decision. On September 20, 1979, the City of Bridgeport filed an application to approve Interim Hiring and to stay further implementation of the District Court decision. This was granted on October 1, 1979 by Judge Daly.

During December of 1979 and January of 1980, the City of Bridgeport attempted further settlement negotiations with the plaintiffs in this case. The City had engaged additional counsel to prepare its appeal brief to the Second Circuit Court of

Appeals. On February 22, 1980, the City of Bridgeport provided a written offer to settle this case to the plaintiffs but the offer was rejected by the plaintiffs on March 31, 1980. On April 30, 1980, oral argument was heard by the Second Circuit Court of Appeals on defendants' appeal of Judge Daly's second decision.

On April 8, 1981, the Second Circuit Court of Appeals' decision was rendered.

In the Second Circuit Court of Appeals decision which is the matter that is now being sought to be reviewed by the Supreme Court, the Court reversed the District Court as far as Title *VI* liability is concerned. The Court, however, affirmed Title *VII* liability against the City of Bridgeport as far as those Firefighters that were hired after March 24, 1972 from the 1971 examination list as well as the 1975 examination list. The Court also affirmed Judge Daly's claim that the Revenue Sharing Act had been violated by Bridgeport. Because the Circuit Court of Appeals threw out the Title *VI* claims, the Court reduced the number of potential hirees to a maximum of 73 instead of the 102 that had been ordered by District Court, Daly, J. The Second Circuit Court of Appeals generally affirmed the District Court's remedy as far as back pay awards and the promotional freeze is concerned although it did change the burden of proof for proving back pay entitlement from the plaintiffs to the defendants.

REASONS FOR GRANTING THE PETITION

The reasons for granting the petition are:

1. The District Court and the Second Circuit Court of Appeals in their judgment have illegally included in the liability class, which also means the remedy class, individuals who are completely barred by the 300 day Statute of Limitations rule as enunciated by the Supreme Court in *United Airlines, Inc.* v. *Evans* and this judgment is, therefore, in direct conflict with the Evans case.

2. The remedy fashioned by the Court to overcome the effects of the 1975 discriminatory test is a complete abuse of judicial discretion because

(a) the Court fashioned its hiring and back pay order on the 1976 and 1977 hiring of 81 whites and 3 minorities, which hiring was by *agreement of the parties* to the lawsuit and *Court approved* and *ordered.*

(b) The Court has ordered hiring of minorities for this position which involves public safety without any testing device, even though the plaintiff's lawsuit was directed at the use of a claimed discriminatory test and was not brought or tried on the theory that *no* successfully passed test is needed to qualify as a Firefighter.

(c) The Court ordered back pay awards to make up for the City's hiring of whites under a Court approved agreement and this is an unconstitutional deprivation of taxpayer property without due process of law.

(d) The back pay awards (which could total millions of dollars under the present Court judgment) are contrary to the principles outlined in *Albermarle* v. *Moody* and the factual situation presented in this case constitutes, at the very least, special circumstances requiring a denial of back pay.

(e) The hiring order and the promotional freeze constitute 100% quotas and are in conflict with the Supreme Court decisions and a different formula should have been utilized to remedy under staffing of minorities in the Bridgeport Fire Department.

I

AS TO LIABILITY — THE CIRCUIT COURT DECISION ILLEGALLY INCLUDES TEST TAKERS BARRED BY THE 300 DAY STATUTE OF LIMITATIONS RULE AND IS IN DIRECT CONFLICT WITH SUPREME COURT CASE, *UNITED AIRLINES* V. *EVANS*

The Court judgment in this case includes 1971 Test Takers that were hired between March 24, 1972 and May 2, 1973. The complaint defined the plaintiff class by reference to the 1975 test only and the plaintiffs argued their case on the basis that they were contesting the 1975 testing mechanism and were only using 1971 data for background information to the Court. Regardless of what theory or what proofs were offered in this case, the case is only a Title *VII* action and it must be based on actual discrimination that has occurred after March 24, 1972. There is no dispute that the last person hired to the Bridgeport Fire Department, not under Court approval, was hired on May 2, 1973. There is no dispute that the first EEOC charge filed by any plaintiff in this case was in October 1975. The EEOC charge was, therefore, untimely because it was not filed within the 300 day period required under the Act. 42 U.S.C. 2000e-5(e).

The plaintiffs, therefore, attempted to save themselves on this provision as far as 1971 Test Takers is concerned by claiming a continuing violation theory. A refusal to hire is a discrete discriminatory act however. *Molybdenum Corp. of America* v. *EEOC,* 457 F.2d 935 (10th Cir. 1972). There is no continuing violation unless actual statutory violations, not the mere effects of past discrimination, occur within the limitations. *United States Airlines, Inc.* v. *Evans,* 431 U.S. 553, 558 (Supreme Court 1977).

The Court has claimed in their judgment that the 1975 test is an extension of the 1971 test and that's where a continuing violation theory can be found. The facts, however, are absolutely contrary to that position because it was the City that affirmatively attempted to develop a new non-discriminatory job-

related test when it hired or joined with other cities to hire Hay Associates in 1972 and 1973 and they (Hay) supposedly prepared a proper examination for the City to give which they did give on March 22, 1975, and which, of course, is the subject of this lawsuit. The only possible discriminatory acts that the City might have done between March 22, 1972 and the examination of 1975 was to hire the 28 Firefighters from the 1971 list, but those hirings are barred by the 300 day Statute of Limitations.

The 1975 test was purposefully a part of the City's design to introduce a new demonstrably non-discriminatory hiring system. The fact that they failed in this effort because the Hay Associates did not properly perform their job does not constitute either a discriminatory act on the part of the City nor does it constitute a continuing policy of discrimination on the part of the City.

The decision of the Second Circuit Court completely ignores the Supreme Court ruling in the *United Airlines* v. *Evans* case which correctly states that time barred claims may not be remedied retroactively.

II

AS TO REMEDIES — THE COURT DECISION CONSTITUTES A TOTAL ABUSE OF JUDICIAL DISCRETION AND IS IN CONFLICT WITH SUPREME COURT PRINCIPLES OUTLINED IN *ALBERMARLE* V. *MOODY*

(A) AN AGREEMENT OF THE PARTIES APPROVED AND ORDERED BY THE COURT FOR INTERIM HIRING IS *NOT* EMPLOYER DISCRIMINATORY HIRING BUT THE COURT USED THIS HIRING AS A BASIS FOR ITS HIRING ORDER AND BACK PAY AWARD

The interim hiring that occurred in the years 1976 and 1977 which resulted in the appointment of 84 Firefighters from the 1975 examination list including 81 whites and 3 minority candi-

dates has been used by the Court to fashion their hiring remedy and back pay award.

Although the City of Bridgeport might have tried to hire Firefighters from the 1975 examination results since there was no temporary restraining order in effect and no preliminary injunction had been ordered in this case, the City never attempted to effect any hirings. Furthermore, the plaintiffs filed a motion for preliminary injunction in January of 1976 but never pressed this motion. And in June of 1976, they filed a further motion for preliminary injunction and included with it a request for a temporary restraining order. The District Court could have held hearings on either one of these claims of the plaintiff and entered appropriate orders that would have prevented all hiring by the City until the lawsuit was decided; or it could have entered an interim hiring arrangement that would have included a percentage factor taking into account both white and minority hiring. The Court never entered such an order and, in fact, entered their order without any restrictions as to whether the hirings were to include certain percentages of minorities and whites. The only criteria was that they would be hired in what was the normal fashion under the existing Civil Service Charter Provisions.

It is important to state the factual situation that existed in 1976 when this hiring order was agreed to by the parties and approved by the Court.

The City was not in good financial shape. At the end of 1975, a new administration was elected to run the City of Bridgeport; it was discovered almost immediately that the City was in precarious financial condition and as a matter of fact in December of 1975, the cash flow situation was so poor that the City privately arranged to have the banks collecting taxes for the City that were to become due in January advance monies to make payroll payments for the last two pay periods of December, 1975.

The new administration and its Mayor had publicly announced that they would pursue all avenues possible to repeal and change a new pension program that was commonly referred to as *"the 20 year and out"* pension program which had been initiated and passed just prior to the 1975 elections by the prior administration and which greatly increased the benefits for retirement for police and firemen in the City. (The *"20 and out"* pension only covered Police and Fire.)

At the same time, lawsuits were commenced by the City contesting out of town residency of policemen and firemen.

These factors brought about a large number of retirements from both the Bridgeport Police and Fire Department. During the first six months of 1976, and even prior to that in the latter part of 1975, more than 100 retirements occurred in these departments.

Although the retirements in the Fire Department resulted in a shortage of personnel, there was never any period and there hasn't been a period even now when the shortage is even more critical where the Fire Department was not properly manned both contractually and for the safety of the citizens of Bridgeport. Overtime, unfortunately, was utilized to bring about proper staffing of the Fire Department.

The factors that were of concern to the plaintiffs, at least to the plaintiffs' lawyers, were (1) that interim hiring could fill the current vacancies of the department and if there were no further retirements in the future, then there would be no jobs that needed to be filled immediately by the City in the event that the plaintiffs prevailed in setting aside the 1975 test as being discriminatory and not job-related. And (2) the plaintiffs were rightly concerned about the serious financial condition of the City of Bridgeport at that particular time and were faced or could have been faced with the possibility that even if they prevailed the City might say we would love to hire additional Firefighters but we are without funds to do so.

Although the action had not been certified as a class action, the Court was aware of the fact that the suit was being pressed as a class action. The Court could have imposed any conditions which it thought were proper for the interim hiring and/or it could have scheduled hearings on the preliminary injunction and more importantly on the temporary restraining order requested by the plaintiffs at any time and made a decision in that regard. This is the normal fashion in which these type matters are handled by the Court. It is, therefore, submitted that the Court was not concerned about the actual makeup, white or minority wise, of the appointments to the Fire Department because 50% of the vacancies were being kept open and the City had guaranteed funding.

The August 26, 1976 agreement of the parties as approved and ordered by Judge Newman of the District Court was filed on September 1, 1976 and is as follows:

> "The parties having met with the Court in chambers and agreed to the following plan, it is hereby
>
> ORDERED that the defendants may make at any time appointments to the Bridgeport Fire Department of a number of firefighters equal to one-half the number for which the city warrants there is and will remain an immediate need and adequate funding. In the event the Court should order a hiring plan, these appointments will be counted as part of such plan. Only appointments meeting the above conditions shall be made until a decision is rendered on the application for a preliminary injunction, provided that the hearing on the application is scheduled to be heard on or before December 1, 1976...."

Furthermore, in the chambers conference before Judge Zampano, District Court of Connecticut, on June 13, 1977 concerning the second agreement towards interim hearing on page 4 of the transcript of that hearing, Mr. Koskoff (Co-counsel for the plaintiffs) stated the following:

> "May I just state that this understanding we have reached today we agree to one in conformance with Judge Newman's earlier — as earlier stated and that it is based upon the understanding that 40 men have been hired by the City, and that, therefore, there are 40 spaces in reserve for minorities should the Court order them to be so filled, and that the City anticipates the hiring of more personnel, and that this plan is being made to assure the fact that there will be an equal number of spaces available for minority personnel should the Court decide to fill those spaces at the conclusion of this lawsuit, and I believe that that accurately states the intention of the order as stated by Mr. Rosen."

The City is and always has been prepared to meet its obligations under the Interim Hiring Orders; in other words, to hire *qualified* minorities to equal the number of whites hired under the Interim Hiring Order, if that was the Court's decision. Of course, in one sense some of these positions have been filled by the subsequent hiring that the City has done while the lawsuit continued; namely, the hiring of the additional 19 minorities and 10 whites.

The most disturbing factor of the 1976 and 1977 Interim Hiring Order is the requirement making back pay awards to all minorities as a result of these hirings. Since these were not discriminatory hirings, this remedy for back pay awards is totally improper and a gross abuse of judicial discretion. The Court effectively said: You followed the Court approval and ordered agreement and now we are going to shaft you for hiring in this fashion.

(B) THE COURT HAS ORDERED HIRING OF MINORITIES WITHOUT THE NEED OF *ANY* TEST WHICH WOULD DISTINGUISH QUALIFIED FROM UNQUALIFIED APPLICANTS.

This Order of the Court requires the City to hire individuals who may be totally unqualified for the position of Firefighter. There is no question that the position of Firefighter involves protecting the life and property of the community and hiring mistakes could directly endanger the health and welfare of the community.

As far back as 1971 in *Griggs* v. *Duke Power Co.,* 401 U.S. 424, the Supreme Court said:

> "Congress did not intend by Title *VII,* however, to guarantee a job to every person regardless of qualifications. In short, the act does not command that any person be hired simply because he was formerly the subject of discrimination or because he is a member of a minority group. Proponents of Title *VII* sought throughout the debate on this measure to assure the critics that the act would have no effect on job-related tests. Indeed, the very purpose of Title *VII* is to promote hiring on the basis of job qualifications rather than on the basis of race or color. Nothing in the act precludes the use of testing or measuring procedures. Obviously, they are useful. What Congress has forbidden is given these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance. Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins. What Congress has commanded is that any test used must measure the person for the job and not the person in the abstract."

In considering Title *VII* legislation in 1964, more than one Congressman reflected the fact that the purpose of the legisla-

tion is not to allow people to be hired, after discrimination has been shown, provided they are qualified. In *United States Steel Workers* v. *Weber,* the Rehnquist Dissent joined in by the Chief Justice at 99 Sup. Ct. 2745, Senator Humphrey, considered by many as the Greatest Liberal of our time, on the debate of Title *VII,* 110 Cong. Rec. 6549 (1964) said

> "Contrary to the allegations of some opponents of this title, there is nothing in it that will give any power to the Commission or to any courts to require hiring, firing, or promotion of employees in order to meet a racial quota or to achieve a certain racial balance.
>
> 'That bugaboo has been brought up a dozen times; but it is nonexistent. In fact, the very opposite is true. Title *VII* prohibits discrimination. In effect, it says that race, religion, and national origin are not to be used as the basis for hiring and firing. Title *VII* is designed to *encourage hiring on the basis of ability and qualifications,* not race or religion." Ibid (emphasis added).

This Court has totally frustrated that purpose of Title *VII.* The judgment even allows for the employment of a minority person who says to the Special Master, in this case, "I would have taken the 1975 test, but I know that Bridgeport will not hire blacks." If that statement is deemed satisfactory to the Special Master, then that person could be hired as a Firefighter by just meeting the other requirements; passing the physical agility test, having a driver's license, and high school equivalency certificate or diploma, etc. (Some high school graduates cannot read.) No testing would be necessary. That same person could also under this present judgment receive a back pay award to October 1976 or some appropriate date that might be established by the Special Master. If this person under the present judgment of the Court claimed that he would have been a 1971 test taker, then he could get back pay to October of 1973. The back pay award could be worth $30,000 per year because of overtime and fringe benefits that are available to a Firefighter

especially if he did not have earnings, unemployment or welfare as a credit against that sum.

Is not such a remedy an abuse of judicial discretion?

(C) THE COURT HAS ABUSED ITS DISCRETION IN AWARDING BACK PAY IN THIS CASE.

The awarding of individual back pay claims to minority applicants or would be applicants is improper and an abuse of discretion in this case. There has actually been no discriminatory hiring by the City of Bridgeport concerning Firefighters since March 24, 1972 which is actionable. The 28 Firefighters hired between March 24, 1972 and May 2, 1973 as a result of the 1971 examination cannot be considered discriminatory hiring because no claims were timely made within the 300 day Statute of Limitations on these hirings. Every Firefighter hired since that date, after September 1976, has been hired either by agreement of the parties and Court approval or by Court order.

A Title *VII* action is an equitable action and back pay should be incidental to equitable relief. The judgment in this case could result in a financial outlay by the City of Bridgeport of millions of dollars; maybe, as much as ten million or even conceivably 20 million dollars. Even at this stage of the proceedings, the City of Bridgeport has no idea who these potential back pay awardees might be. They are persons who might come forward claiming they have the necessary qualifications for Firefighter but never bothered to take the 1975 or 1971 examination because they thought that Bridgeport was a discriminatory employer. Even if all of these persons were known at this time, the judgment allows the Special Master to pick at random those persons that he might consider should receive back pay awards.

Plaintiffs' counsel has stated they didn't care what kind of a testing device was utilized for the purpose of hiring minority firemen, because they were only interested in the monetary award and I might say counsel fees.

The Supreme Court in *Albermarle* v. *Moody,* 422 U.S. 405 (1975), while it set down the general proposition that back pay was a proper remedy in Title *VII* case, also reflected that there are special circumstances that would justify the denial of back pay even though the statute has been violated.

Victims, those who were in fact damaged, should be made whole without "granting a windfall to the class at the employer's expense." See *Pettway* v. *American Cast Iron Pipe Co.,* 494, F.2d, 211, 262 note 152 (5th Cir. 1974).

The District Court should have considered how many vacancies would have been filled by minorities in the absence of discrimination. In other words, if the test had been found to have had no adverse impact and a proportionate number of minorities had passed the test, then 15% of the candidates hired would have been minorities.

The Second Circuit Court of Appeals has said in *EEOC* v. *Steamfitters Local 638,* 542 F.2d 579, 588 (2nd Cir. 1976):

> "It is one thing to grant retroactive or constructive seniority to discriminatees deterred from applying for jobs or promotions. It is another thing to grant back pay to those who never applied for a job because they thought it was useless to do so."

But in the judgment in this case, the Court has allowed back pay to people who never applied for the Firefighter position.

In the *Albermarle* case, the Supreme Court merely enunciated the proposition that back pay awards cannot be denied because an employer has shown good faith rather than bad faith in his discriminatory employment practice. Although the District Court, Daly, J., found good faith by the City of Bridgeport in their preparation and giving of the 1975 test, the City does not contest back pay on the good faith-bad faith doctrine. It is all the other factors outlined in this case that the City claims consti-

tutes *Special Circumstances* which justify the denial of back pay, even though the statute has been violated.

The Supreme Court did not identify what *special circumstances* might consist of. If the facts in this case do not constitute special circumstances, then there is no real doctrine of *special circumstances.*

It is, therefore, critical that the Supreme Court consider this case so that it can identify for the employers of this country what *special circumstances* would justify the denial of back pay. If the Supreme Court is reluctant to set criteria for special circumstances, then it should declare that back pay must always be awarded if discrimination has been found.

(D) THE 100% HIRING QUOTA AND PROMOTIONAL FREEZE CLEARLY EXCEEDS THE LOWER COURT'S REMEDIAL AUTHORITY AND IS CONTRARY TO SUPREME COURT OPINIONS.

The Court judgment has imposed a 100% hiring quota in favor of the minorities for the next possible 73 hirings to be made by the City of Bridgeport. The Court judgment also has imposed a 100% freeze on the present members of the Bridgeport Fire Department from competing for the next higher ranks in the department namely, Pumper Engineer and Lieutenant.

The Petitioners position, that is the City of Bridgeport's position, naturally is opposed to hiring and promotional quotas. However, in this case, the Petitioners are more concerned with the Court judgment that allows (1) the hiring of Firefighters without any qualifying test and (2) the potentially astronomically expensive back pay awards in this case. If the Courts below (District Court and Second Circuit Court of Appeals) had imposed a hiring quota, even though it was not legally justified and even though it was contrary to the opinions of the Supreme Court, but they had allowed the City to test in some proper fashion for qualification for the position of Firefighter,

and they had not punished the City with an improper and vicious back pay award, the City of Bridgeport would not be appealing this case.

The City needs Firefighters. The City is more than willing to hire minority Firefighters. The City and its public officials, until the experience of the Police Guardians case, were convinced that the Civil Service Charter and its Rules were the complete law on employment hiring. This is a situation that has occurred in a snowball fashion and unfortunately could not be rectified in a fast and efficient fashion because of legal requirements imposed by the City Charter. It would be desirable for the Fire Department as well as all other City departments to reflect in the employee makeup, the actual makeup of our City's population and labor force as far as all nationalities are concerned. Bridgeport is unique because even though it has at the present time a large number of black and hispanic citizens, it still has significant numbers of very diverse nationalities. Bridgeport like New York City in the past seventy-five years was always considered to be a melting pot for not only all European peoples but also Western hemisphere and Asian peoples as well.

The actual facts of this case, however, do reflect the fact that the lower Courts, that is the District Court and the Second Circuit Court of Appeals, have misapplied the law in ordering the 100% hiring quotas and 100% promotional freeze.

The Constitution's equal protection clause requires that classifications which prefer members of one group because of race or ethnic origin be judged with exacting scrutiny. See *Loving* v. *Virginia,* 381 U.S. 1 page 11 (1967).

A quota which constitutes Court imposed reverse discrimination cannot stand absent exceptional or compelling government purposes. *Kirkland* v. *Department of Correctional Services,* 520 F. 2d 420 (2nd Cir. 1971). *Regents of the University of California* v. *Bakke,* 438 U.S. 265 (1978).

The power to provide an effective remedy affords no basis for depriving non-minorities of constitutionally protected rights. *Carter* v. *Gallagher,* 452 F.2d 315, 330 (8th Cir. 1971).

Although private employers may be free to end vestiges of past societal discrimination, a District Court's power to fashion remedies for proven statutory violation is restrained by the Constitution and Section 706 (g) of Title *VII.* That section makes relief appropriate for *identifiable victims* of hiring discrimination. *Franks* v. *Bowman,* 424 U.S. 747, 779 (1976).

A District Court is without power or authority to use a Title *VII* violation as a springboard for ending the ancient vestiges of historical discrimination. While the legislative history of Title *VII* affords latitude to private employers in their efforts to end the vestiges of past discrimination, a Court's power to remedy statutory violations is necessarily limited by the Fourteenth Amendment constraints. *United Steelworkers* v. *Weber,* 99 Sup. Ct. at 2729. Weber further disapproves of absolute bars to the employment interests of non-minorities, which is what has happened in this case even though the Circuit Court claims this will only be for a short period of time.

It should also be pointed out in this case that the City of Bridgeport was never allowed to offer any testimony in the case to combat the so-called evidence submitted by the plaintiff as to pre Title *VII* discriminatory activity even though the plaintiffs, of course, claimed it was only for background information to the Court. This is important because the law clearly distinguishes between pre and post Title *VII* hiring practices, observing that the employer must be given the opportunity to show that the claimed discriminatory pattern was, if it existed at all, a product of pre-act hiring rather than post-active discrimination. *Hazelwood School District* v. *United States,* 97 Sup. Ct. 2736.

The 100% promotional freeze that has been ordered in this case is especially disturbing. The City of Bridgeport and the Fire Department can survive this freeze in the same fashion that they are doing at the present time; namely, with the use of provi-

sional appointments to the positions of Pumper Engineer and Lieutenant. This has raised many Union problems and grievances and cost the City of Bridgeport much time and effort in trying to remedy these problems, but the department does function and the safety of the City is not in jeopardy.

However, this is a very undesirable situation for the present members of the department. Many firefighters have been in their present position for ten, fifteen or twenty years. As a matter of fact, men have retired from the Fire Department with more than thirty years service who have never advanced beyond the initial position of Firefighter. The difficulty, however, to the present members of the department is that those that are interested in trying to improve their position in the department have been unable to take an examination to move up the ladder. There is no legal or moral reason why at least 50% of the current vacancies in these two positions cannot be filled by proper examinations for those members of the department now on the force.

A proper remedy would have been to reserve a percentage of the vacancies in these two promotional categories so that the newer members of the Fire Department, including the more recent minority appointees and those minority men that might be appointed in the near future would then have a right to compete for jobs that could be filled at that time. Innocent white members of the Fire Department are being punished by the present Court judgment, and it is submitted this constitutes abuse of the discretion of the Court as far as the remedy in this case is concerned.

CONCLUSION

This case must be considered by the Supreme Court and a reversal of the lower Courts' decisions is mandatory; otherwise, a grave injustice will have been done. It is regretable that the lower Courts, in their consideration of this case, did not order remedies that would have provided meaningful public employment positions for qualified minorities and at the same time not punish the ordinary taxpayers of the City and innocent white members of the Fire Department.

If a Title *VII* action is really an equitable action, then equity should be granted by the Courts. If it is not an equitable action, and the monetary demands and monetary orders of the Court made in this case make it look like a legal action, then in that event, a party (the City of Bridgeport) should have the right to seek redress from a jury if it so desires. Employment discrimination cannot be remedied with judicial decisions like the case at bar.

Therefore, for all the reasons outlined herein, it is respectfully requested that this Court grant the Petition for Writ of Certiorari herein.

Dated this 25th day of August, 1981, at Bridgeport, Connecticut.

Respectfully submitted,

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Attorney for Petitioners

Appendix

81-374

Office-Supreme Court, U.S.
FILED
AUG 26 1981
ALEXANDER L. STEVAS,
CLERK

No.

In The

Supreme Court of the United States

OCTOBER TERM, 1981

THE CITY OF BRIDGEPORT, ET AL
Petitioners-Defendants,

vs.

ASSOCIATION AGAINST DISCRIMINATION IN EMPLOYMENT, INC., ET AL
Respondents-Plaintiffs,

AND

BRIDGEPORT FIREFIGHTERS FOR MERIT EMPLOYMENT, INC., ET AL
Respondents-Intervenor Defendants.

APPENDIX

VOLUME ONE

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VOLUME ONE

Pages

APPENDIX A.

Association Against Discrimination In Employment, Inc. v. *City of Bridgeport*, ____ F.2d ____, Slip Op. 6931 (April 8, 1981) 1a-69a

APPENDIX A

UNITED STATES COURT OF APPEALS

Nos. 549, 1103, 1228 — September Term 1979

(Argued April 30, 1980 Decided April 8, 1981)
Docket Nos. 79-7650, -7652, -7709

ASSOCIATION AGAINST DISCRIMINATION IN EMPLOYMENT, INC., ROOSEVELT JOHNSON, CRAIG KELLY, CHARLES HERD, ROBERT LEWIS, WILLIAM CARY, CHARLES R. YOUNG, HERMAN AGOSTO, HARMIN LINARES, ISMAEL POMALES, SALVADOR PEREZ, and on behalf of all others similarly situated,

Plaintiffs-Appellees-Cross-Appellants,

-v.-

CITY OF BRIDGEPORT, NICHOLAS PANUZIO, ROBERT W. WEEKS, JR., EDWARD F. DALEY, JULIUS NOBILI, WILLIAM G. PJURA, FRANK J. DEPRINZIO, ALAN COHEN, BRIDGEPORT CIVIL SERVICE COMMISSION, CHARLES E. PORZELT, ANDREW GOTTFRIED, SALVATORE S. SPADACCINO, CHARLES J. DOUGIELLO, JOHN J. HANNON, JOHN F. GLEASON, DAVID SULLIVAN, WILLIAM D. MIKLUS, ALBERT SCHWARZ, BRIDGEPORT BOARD OF FIRE COMMISSIONERS, individually and in their official capacities,

Defendants-Appellants-Cross-Appellees,

and

BRIDGEPORT FIREFIGHTERS FOR MERIT EMPLOYMENT, INC., JOSEPH DICARLO, THOMAS NAPLES, PHILIP LYNCH, BRUNO BRESSIE, THOMAS O'CON-

NELL, FRANK G. BENDER, and ROBERT B. ANDERSON,

Intervenors-Defendants-Appellants-Cross-Appellees.

Before: LUMBARD, VAN GRAAFEILAND and KEARSE, *Circuit Judges.*

Appeal from a judgment of the United States District Court for the District of Connecticut, T. F. Gilroy Daly, *Judge*, finding City of Bridgeport liable for employment discrimination in violation of Titles VI and VII of the Civil Rights Act of 1964 and the Revenue Sharing Act, and ordering broad affirmative relief.

Affirmed in part, vacated in part, and remanded for modification.

DAVID N. ROSEN, New Haven, Conn. (Michael P. Koskoff, Bridgeport, Conn., on the brief), *for plaintiffs-appellees-cross-appellants.*

JOHN J. McNAMARA, Bridgeport, Conn. (Raymond B. Reubens, Bridgeport, Conn., Bruce A. Nelson, John L. Beers, Steven B. Berlin, Wendy L. Tice-Wallner, Morrison & Foerster, San Francisco, Calif., on the brief), for *defendants-appellants-cross-appellees.*

J. DANIEL SAGARIN, Bridgeport, Conn. (Harrigan, Hurwitz, Sagarin & Rutkin, P.C., Bridgeport, Conn., on the brief), *for intervenors-defendants-appellants-cross-appellees.*

STEVEN H. ROSENBAUM, Washington, D.C. (United States Department of Justice, Drew S. Days, III, Asst. Attorney General, David L. Rose, Washington, D.C., on the brief), for United States as *amicus curiae.*

McGUINESS & WILLIAMS, Washington, D.C. (Robert E. Williams, Douglas S. McDowell, Washington, D.C., on the brief), for Equal Employment Advisory Council as *amicus curiae*.

KEARSE, *Circuit Judge:*

This employment discrimination suit, now before this Court for the second time, was commenced in 1975 in the United States District Court for the District of Connecticut on behalf of black and hispanic residents of Bridgeport, Connecticut against the City of Bridgeport and other individuals responsible for hiring firefighters for the City of Bridgeport (hereinafter collectively the "City"). The plaintiffs contend that the City unlawfully discriminated in entry-level hiring practices for the Bridgeport Fire Department, in violation of Titles VI and VII of the Civil Rights Act of 1964 (the "Act"), 42 U.S.C. §§ 2000d to 2000d-6, and 2000e to 2000e-17 (1976), and the antidiscrimination provision of the State and Local Fiscal Assistance Act ("Revenue Sharing Act"), 31 U.S.C. § 1242(a) (1976). After trial, the district court ruled that a 1975 examination administered by the City violated Title VII. 454 F. Supp. 751 (D. Conn. 1978). The court enjoined further use of the exam, and ordered various remedial measures, including requirements that only minority[1] candidates be hired until their number equaled the number of white candidates hired since 1975 and that thereafter one-half of all vacancies be filled by minority candidates until there were 125 minority firefighters in the force. 454 F. Supp. 758 (D. Conn. 1978).

On appeal, this Court concluded that the opinions below provided an insufficient basis for review of the sensitive questions raised by "sweeping affirmative relief, including hiring quotas." 594 F.2d 306, 309 (1979) (*"ADE v. Bridgeport"*).

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[1]The term "minority" has been used in this case to refer to black and hispanic persons, and will be so used in this opinion.

Accordingly, the district court's order was vacated and the case remanded for further consideration. Following a limited hearing on remand, the district court reaffirmed its original determination that the City was liable under Title VII, determined that the City was also liable under Title VI and the Revenue Sharing Act, and modified in several respects the relief ordered. 479 F. Supp. 101 (D. Conn. 1979.)

On this appeal the City and the intervening current firefighters challenge the findings of liability under Title VI and liability under Title VII prior to 1975, and they attack most aspects of the remedial order. Plaintiffs have cross-appealed, challenging two limited aspects of the relief granted. For the reasons below, we generally affirm the decision of the district court, but vacate the finding of liability under Title VI and remand portions of the remedial order for modification.

I. FACTS AND PRIOR PROCEEDINGS

Since 1936, the City's process of selecting its firefighters has included the giving of a written examination. In 1972, having had only two minority firefighters since 1936, having recently been sued for employment discrimination in its police department, and perhaps recognizing the approaching applicability of Title VII to municipalities, Bridgeport joined ten other Connecticut cities in hiring a consulting firm to develop a new exam for firefighters. The resulting exam was administered by the City in 1975. In order to qualify for firefighters positions, candidates were required to achieve a score in or above the 75th percentile of those taking the exam; they were then ranked according to their scores. In addition, a 1975 candidate was required to pass medical and physical agility tests, be over the age of eighteen, be a high school graduate or have earned high school equivalency certification, have resided in the City for at least one year just prior to taking the written exam, and hold a valid Connecticut driver's license.

Of the 661 white candidates who took the 1975 exam 184, or 27.8%, passed. Of the 110 minority candidates who took the exam, eight, or 7.3%, passed.

A. The Complaint

The initial complaint in this action was filed on September 2, 1975, by the Association Against Discrimination in Employment and ten individual plaintiffs who are black or hispanic residents of Bridgeport, on behalf of themselves and all others similarly situated. The plaintiffs alleged that the City had engaged in a "policy and practice of discriminating on the basis of race, color and/or national origin against minority group members" and that minority group members "are currently being denied initial employment and promotion in the Bridgeport Fire Department." The original complaint attacked the 1975 test as well as the City's prior practices, asserting claims under 42 U.S.C. §§1981 and 1983 (1976), and Title VII; the complaint was amended several times, as plaintiffs withdrew the claims under §§ 1981 and 1983 and added allegations of violation of Title VI and the Revenue Sharing Act, and alleged the filing of charges with the Equal Employment Opportunity Commission ("EEOC"). Unless otherwise noted, reference hereafter to the "complaint" are to the third amended complaint in its final form.

In July 1976, Bridgeport Firefighters for Merit Employment, Inc. ("BFME"), a non-profit organization, was permitted to intervene as a defendant and cross-claimant, representing "non-firefighters minority within the Bridgeport department of fire services." BFME's cross complaint sought relief from any injury which might be done to nonminority firefighters by the City as a result of any modification of the City's existing hiring or promotional practices.

B. Interim Hiring from the 1975 List

Shortly after the intervention of BFME, plaintiffs learned of the City's plans to make immediate appointments from the list

of eligible candidates generated by the 1975 exam, and moved for a preliminary injunction against such appointments. The motion came before Judge Newman, who issued an order, on consent of all parties, permitting defendants to "make at any time appointments to the Bridgeport Fire Department of a number of firefighters equal to one-half the number for which the city warrants there is and will remain an immediate need and adequate funding." The order further stated that "[i]n the event the Court should order a hiring plan, these appointments will be counted as part of such plan." Pursuant to this order 40 firefighters were hired commencing in October 1976.

In 1977 the City sought to hire additional firefighters from the 1975 list. On June 13, 1977, the parties agreed, before Judge Zampano, that the City could hire additional firefighters from that list under substantially the same conditions as those set forth in Judge Newman's order. Thereafter 44 additional firefighters were hired.

Of the 84 firefighters hired pursuant to the interim orders, 81 were white and three were minorities.

C. The Trial Court's Initial Decision

In 1978, following a substantial period of discovery, an eleven-day trial with respect to liability was held before Judge Daly. The court found that the City had violated Title VII. It observed that although minorities comprised 41% of Bridgeport's population the Bridgeport Fire Department, 428 members strong, had only one minority firefighter prior to the 1975 exam. The court found that the 1975 exam "did little to alter this imbalance": only eight of the 192 candidates who passed it were members of minority groups, and the pass rate for nonminority candidates was more than three times that for minority candidates. The court concluded that these statistics left "no doubt that the firefighters exam had a disparate impact on the named plaintiffs and the class of persons they represent." 454 F. Supp. at 754.

As to the merits of the test itself, the court found that it was doubly flawed. First, the exam had no rational relationship to the skills needed in firefighting. The test was developed, by the consulting firm retained for that purpose, without compiling any list of critical work behaviors and with no effort to rank the rated skills in terms of their importance to the job.[2] 454 F. Supp. at 755-56. Indeed, in handing down his order on remedy, Judge Daly noted that the Bridgeport Fire Chief had testified at the remedy hearing "that there might be an inverse correlation between those who passed the exam and those who are most qualified to be firefighters." *Id.* at 759. For example, while the Fire Chief stated that superior physical ability and intelligence are the two most important attributes, the 1975 hiring process used simply a pass-fail physical agility test, and the 1975 written exam weighed negatively any high scores on comprehension questions, thus "Penaliz[ing] those who indicated that they were 'inquiring, curious, analytic, exploring, intellectual, reflective, incisive, investigative, probing, logical, scrutinizing, theoretical, astute, rational [and] inquisitive.'" *Id.*[3] Ironically, the court noted that the 1975 exam "represented a decided improvement over some of the earlier civil service exams employed by Bridgeport." 454 F. Supp. at 757.

The second flaw in the 1976 exam lay in the City's selection of 12 as the minimum passing score, a choice that the Court found "bore no relation to 'normal expectations of proficiency.'" *Id.*[4] (quoting 19 C.F.R. § 1607.6 (1977)). The court found that

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[2]The court noted, for example, that having a feel for public relations was ranked just as highly as composure under pressure.

[3]Although eleven cities joined in having the test developed, only Bridgeport chose to use it after seeing the questions.

[4]The passing score on the 1975 exam was set at 12—the score that marked the 75th percentile in performance. It is not clear why this cutoff was chosen; Bridgeport's City Charter required that candidates answer correctly at least 75% of all exam questions, not that passing candidates be better than 75% of those taking the exam.

lowering the passing score from twelve to six would have significantly alleviated the discriminatory impact of the exam.

The court concluded that the use of the 1975 exam could not be continued, and it awarded a variety of relief to minority candidates for firefighter positions. Because it had found the 1975 exam not job related, the court began "with the premise that the firefighters exam administered in 1975 did not distinguish qualified from unqualified applicants." 454 F. Supp. at 759. Since testimony showed that the 84 firefighters hired while the case was pending were adequately performing thier duties and since their scores on the non-job-related exam did not demonstrate that they were any better qualified than those who failed, the court found it "fair to assume that all of the applicants who are able to pass the same agility test and medical examination will be capable of performing at least as well as the eighty-four men already hired." *Id.*

With the goal of "remedying the disparate impact of the firefighters exam by placing those frustrated applicants on a parity with the eighty-four men who have been hired," 454 F. Supp. at 759-60, the court ordered the immediate hiring or "Blacks and Hispanics who filed applications with the civil service office for the 1975 firefighters exam and who pass both the agility test and the medical examination." These applicants were also awarded backpay and seniority retroactive to October 1976. Once the 1975 minority applicants were hired, the City would have been required to make all future selections from a pool of qualified minority candidates until the number of minority candidates hired since 1975 equaled the number of white candidates hired since that time, and then to hire one-half of all firefighters from the minority pool until the number of minority firefighters totaled 125.

D. The First Appeal

Defendants appealed to this Court, attacking both the finding of liability and the remedy. They contended, *inter alia*, that their selection of an employment test was an administrative

decision that could not be overturned if supported by substantial evidence, and that the relief ordered amounted to the imposition of a quota that was unconstitutional, unlawful under § 703 (j) of Title VII, and unwarranted by the facts. Plaintiffs cross-appealed, arguing that the district court had improperly limited backpay to those minority candidates who had taken the exam in 1975 and were to be appointed pursuant to the court's order, rather than including minority candidates who had taken the exam in 1975 but no longer desired appointment or no longer met the prerequisites and minority candidates who had been deterred from applying by defendants' past discriminatory practices.

This Court recognized that "[n]o manner of legal argument can justify" the virtual absence of minorities on the force, 594 F.2d at 308, but found the district court's opinions trebly inadequate to permit resolution of the challenges to the relief ordered. First, it was not clear that the district court had considered any of this Court's recent opinions dealing with quotas. We offered the following guidance with respect to those opinions:

> Looking to the decisions of our own court, it is reasonably clear that for some of its members quota relief can constitutionally be justified only if necessary to redress 'a clear-cut pattern of long-continued and egregious racial discrimination,' and if the reverse discriminatory effects of the quota do not fall upon 'a small number of readily identifiable' nonminority persons. *Kirkland* v. *New York State Department of Correctional Services*, [520 F.2d 420, 429 (2d Cir.), *rehearing denied*, 531 F.2d 5 (2d Cir. 1975), *cert denied*, 429 U.S. 823 (1976)].

594 F.2d at 310. Thus we instructed the district court to consider the relevant authorities expressly and to make appropriate findings, answering such questions as (a) whether its ruling on liability was based on discrimination before or after 1972, and on what theories it relied, and (b) why the quota required the

hiring of minorities in a ratio that exceeded their representation in the group of applicants who took the 1975 test.

Second, it was not apparent what effect the district court had given to the two pretrial orders that had permitted the City to hire 84 firefighters from the 1975 list. Various interpretations were possible. Plaintiffs contended, for example, that the parties had impliedly agreed that if the test were held invalid, the hiring of 84 blacks and hispanics could immediately be ordered. BFME, on the other hand, contended that plaintiffs had agreed to the interim orders in order "to avoid an early hearing and...in exchange for guaranteed funding for positions which might, but not necessarily would, be assigned to minority group members." *Id.* at 312 (footnote omitted). The City contended that the interim orders immunized it from any backpay liability. Since the district court had not explicitly considered the implications of the interim orders, we instructed it to do so on remand.

Finally, we noted the district court's stated view that the disparate impact of the exam could have been significantly alleviated by lowering the passing score. While declining to express a view as to "whether an employer who selects a cut-off score and defends it until the test has been found not job-related can then avoid the implications of that finding by adjusting the passing score to a point where the disparate impact is arguably insignificant," 594 F.2d at 313 n.20, we directed the district court to explore, on remand, the possibility

> that some plan which accepts the reduction of the passing mark to six and treats the list as a qualifying list without ranking, subject to passing physical and medical examinations, would, as an interim measure, afford substantial minority representation and be acceptable as part of an overall settlement that the parties may still discover to be the most sensible course of all.

Id. at 314.

II. PROCEEDINGS LEADING TO THE PRESENT APPEAL

A. Structuring of Issues for Consideration on Remand

On remand, the parties expressed varying views as to the proper scope of the new proceedings. BFME, apparently envisioning a completely new trial of all the issues in the case, served on plaintiffs requests for more than 180 admissions of "fact," ranging from the basic concept of civil service hiring, to the validation of the 1975 test,[5] to the state of employment discrimination law in this Circuit. Plaintiffs and the City set considerably narrower sights. The City stated that it wished to submit further evidence on three issues that it described as follows:

> 1. The effect on disparate impact if the passing score is reduced from 12 to 6 and differential adjustments are made.
>
> 2. Adopt a plan which accepts the score reduction and treats this list as a qualifying list without ranking, subject to passing physical and medical examinations, which would afford substantial minority representation on the Fire Department.
>
> 3. Whether the City has a long history of notorious discriminatory practices in its hiring policies?

Plaintiffs, expressly reserving their position that the City could not avoid liability "by manipulation of the passing score after having been found to have discriminated," stated that they had no objection to presentation of further evidence on the City's first and third issues, nor on the second to the extent that it simply reflected the City's position with respect to remedy.

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[5]For example, Request No. 107 stated: "Lack of detail on the job analysis used in constructing the 1975 test was an asset rather than a detriment to the accuracy of the test."

Plaintiffs proposed, in addition, to submit evidence with respect to the current manpower needs and vacancies within the fire department, and with respect to Title VI. As to the latter, plaintiffs stated as follows:

> After the trial in this case the Supreme Court addressed issues relating to Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d, *et seq.*, issues which are raised in the pleadings in this case. The record is not clear with respect to the relevance of Title VI to this case, in that there is no evidence relating to receipt of federal funds by the City other than Revenue Sharing funds. The record should be developed on this issue, by having the record reflect the City's receipt of funds, in order to avoid the necessity for a remand at some future time.

In a prehearing order, the district court reviewed the directions given by this Court on the first appeal and determined that a broad-ranging evidentiary hearing was uncalled for. Directing that any additional evidence be limited to that suggested by this Court's opinion and that necessitated by the passage of time since the district court's original remedy order, Judge Daly ruled that the issues as to which supplementary evidence would be permitted were the effect of the interim hiring orders, the effect of lowering the passing score on the 1975 exam, and the present personnel needs of the fire department. Discovery on other issues was denied. The court stated that further findings with respect to the appropriateness of quota relief would be based on the prior record.

B. The Supplementary Presentations of Evidence

An evidentiary hearing was held, limited to the three issues specified by the district court. The defendants offered expert testimony as to various candidate selection methods by which the disparity in pass rates on the 1975 test could be eliminated,

assuming the passing level were lowered from twelve to six.[6] Plaintiffs offered expert testimony to show that lowering the passing score from twelve to six would not eliminate the disparate impact of the exam because it would merely decrease the disparity in pass rates from 20.5 percentage points to 14.2 percentage points, still a highly significant statistical difference.[7] The defendants' expert conceded that merely lowering the test score, without also adopting one of the methods he espoused, would not eliminate the disparate impact of the exam.

Testimony on issues other than those specified in the court's prehearing order was rejected. Thus, when the defendants proferred the testimony of a statistician and a chart to show that the percentage of minorities in the Bridgeport labor market of persons over the age of 18 with a high school diploma would not exceed 18%, the court sustained plaintiffs' objections on the ground that this issue had been fully litigated at trial and the evidence was beyond the scope of the hearing. Similarly, when plaintiffs called the City's Comptroller to testify on the subject of the City's use of federal funds in the fire department, to support their Title VI claim, the court sustained the City's objection that such testimony would be outside the scope of the hear-

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[6]The witness described three possible approaches. The first involved creation of two pools—white candidates and minority candidates—and the selection from each pool, according to rank within the pool, of a number of candidates in proportion to the number who took the exam. Under the second approach, one applicant pool would be created with a sufficient proportion of minority individuals to make it likely that random selection from the pool would result in minority hires in proportion to the number of minority applicants. The third approach involved creation of separate minority and non-minority pools, with candidates selected at random from each pool in proportion to the number of applicants who took the exam.

[7]Plaintiffs' expert testified that the likelihood that such a difference would be attributable to chance would be less than five chances in one thousand.

ing. The court stated, after ascertaining that the City's budget was published, that judicial notice would be taken of the budget.

It does not appear that the entire published budget was ever presented to the court. Subsequent to the hearing, plaintiffs filed the affidavit of a paralegal employed by plaintiffs' counsel, annexing photocopies of four pages described as part of the City's "Public Employment Employee Roster." The affidavit stated that these pages showed that in 1971 and 1972, "some federal money," provided under the Emergency Employment Act, "was used by the City to hire personnel for the Fire Department."

C. The Decision on Liability

Following the submission of such supplementary evidence as was allowed, the district court made detailed findings of fact and set forth its conclusions of law.

The court found that, even had there been no additional evidence of discrimination, the statistical evidence alone would have established a prima facie case of discriminatory impact. In 1975, when black and hispanic persons comprised approximately 41% of the labor force, the City's fire department had 427 whites, one hispanic, and no blacks. In its entire history prior to 1975, the City had employed only two minority firefighters, one of them hired in 1938. Following the institution of the present suit, the City had, pursuant to the two orders permitting interim hiring, hired 84 firefighters; 81 of them were white. The court noted that the City's hiring of minorities approached the "inexorable zero.'" 479 F. Supp. at 109 n.9, quoting *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 342 n.23 (1977).

"Not suprisingly," the court found, the City had a strong reputation for discrimination in employment. Indeed, its "reputation for employment discrimination against black and hispanic persons...was 'by far the worst' of all cities in Con-

necticut." 479 F. Supp. at 106. The court found that the City's reputation, as well as certain of its actions, described below, deterred minority persons from even applying for City employment: "This reputation created the attitude in the black community that '[i]f you're black, just don't apply because you won't get the job.'" *Id.*

As to the merits of the 1975 test, the court found again that it was not job related and that it had a disparate impact on minority candidates. The court expressly incorporated its original findings with respect to the invalidity of the test, *see* Part I. C. *supra.* In addition the court found that certain parts of the exam were significantly discriminatory against blacks, and that certain of the test score data were improperly used. If adjustments were made for the improperly used data, using the 1975 test as a predictor of job performance would be "'about as good...as tossing a coin.'" *Id.* at 110 n.10, quoting testimony of Dr. John Peck.

In answer to one of the questions posed by this Court on the first appeal, Judge Daly found that merely reducing the passing level on the 1975 exam from twelve to six would not spare the City liability for unlawful discrimination. First, the court concluded, on the basis of testimony from experts on both sides, that such a reduction would decrease, but not eliminate, the disparity between the pass rates of whites and minorities; and the resulting disparity would still prove discriminatory impact. The court also concluded that it would be inappropriate for the court to order hiring on the basis of, and to undertake administration of, an employment test that had been proven to have no relation to job skills. Finally, the court found that even if the disparate effects of the 1975 test could be eliminated by lowering the passing level, the City could not avoid liability for employment discrimination, because it had "engaged in a policy and practice of discrimination extending well beyond the 1975 exam." *Id.* at 109-10 n.10.

The court found that the City had made little or no effort to recruit minority persons for the fire department Noting that,

despite its awareness of its discriminatory policies and reputation, the City had not adopted any affirmative action program until it was forced to do so in order not to lose some $7 million in federal funds, the court found that "[n]o voluntary efforts have been made by the City to comply with its own affirmative action goals for the Fire Department." *Id.* at 113 n.12. The court found that "[a]bsolutely no attempts were made to recruit minority applicants" for fire department examinations prior to 1972, *id.* at 106, and that no significant recruiting efforts were made by the City thereafter. *Id.* at 107. The court found that the City's pre-1972 failure to recruit minority persons for the fire department was deliberate.

Indeed, the court found that the City had "engaged in a continuing pattern and practice of...actively deterring minority persons who have sought to become firefighters." *Id.* at 104-05. For example, it found that, while a coalition of community minority groups, coordinated by a local official of the United States Labor Department, was attempting to recruit minority candidates for the fire department, the City probably impeded these efforts. The City Civil Service Commission's personnel director furnished the coalition with a notice of the 1975 examination, and stated that familiarilty with fire department tools, knowledge of first aid and knowledge of the geography of Bridgeport would be covered on the test. The coalition then, in sessions open to anyone, regardless of race, gave applicants training in these subjects. But the subjects covered by the 1975 test bore no resemblance to these areas; there were no questions involving geography, or first aid, or the use of firefighting equipment. *Id.* at 107-08. The understandable reaction of the minority applicants who had studied these rather pertinent subjects, only to be confronted with a test that did not mention them, was, "'[t]he City has fooled us again.'" *Id.* at 108.

The court found that the City had also engaged in several acts of discrimination against individual minority candidates. Plaintiff Ismael Pomales, for example, took the 1975 exam and passed it. However, he did not receive any notification that he

had passed until he was informed that his name was being removed from the eligible list because he had not appeared for the physical agility test that those who passed the written exam were required to take. Other candidates were prevented from even taking the written test. One such candidate, class member Elias Castro, an hispanic with four years' experience as a firefighter in the United States Air Force, attempted to file his application with the Civil Service Commission in the middle of the afternoon on the last day for filing applications. He was told that is was too late. He was not allowed to speak to the superior of the person who told him it was too late, and he was not informed of any means by which he could appeal or lodge an official complaint. He did not get to take the 1975 exam. Another candidate, plaintiff Harmin Linares, filed his application before the deadline and was told that a notice would be mailed to him stating the date and time of the exam. He never received such a notice, and he did not get to take the exam.

Finally, the court found that the City's discrimination against minorities was of long duration. It reveiwed the written firefighter exams that the City had given in 1965, 1968, and 1971. It found that none of these tests was job related and that all had had a disparate impact on minority applicants. For all these pre-1975 tests combined, those identified as nonminority candidates[8] had passed at the rate of better than one out of every three; of eighteen identified minority applicants, only one had passed. *Id.* at 108 n.9.

Thus, the court concluded that the City had "engag[ed] in a policy and practice of discrimination against black and hispanic persons relative to entry-level hiring in the Bridgeport Fire Department," *id.* at 111; *see id.* at 111-12; and that its pattern

[8]Of the 384 applicants who took the three tests, the races of 53 were unknown. All 53 failed the examinations. The court noted that even if it were assumed that all 53 were white—the hypothesis most unfavorable to plaintiffs' claims—the pass rate for whites would be reduced only from 36.2% to 30.9%, a percentage far above the 4.8% minority pass rate.

of discrimination was "'clear-cut[,]...long-continued and egregious.'" *Id.* at 112.

On the basis of these findings the court concluded that the City had violated Title VII, which prohibits discrimination in employment on the basis of race. Noting that the Title VII had not become applicable to municipalities until March 24, 1972, the court found that the combination of the statistical evidence, the City's use after that date of the results of the discriminatory examination held in 1971, and the City's policy and history of discrimination, including its deliberate failure to recruit minority applicants, compelled the conclusion that the City's violation of Title VII dated back to March 24, 1972.

Relying on many of the above findings, the court concluded also that the City's discriminatory policies and practices violated Title VI, dating back to January 1, 1971. Stating that Title VI prohibits such discrimination in "'any program or activity receiving Federal financial assistance,'" *id.* at 111, quoting 42 U.S.C. § 2000d (1976), the court held that the City's receipt of such funds had been adequately proven.

Finally, the district court found that the City had received revenue sharing funds in every year since 1973, and that it had expended these funds, in part, for the operation of its Fire Department. The court concluded that the City's discriminatory practices had therefore violated the Revenue Sharing Act since January 1, 1973.

D. The Remedy

In light of its expanded findings and conclusions, the district court fashioned a new remedial order, which we set forth in pertinent part in the margin.[9] The order banned any further use of

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[9] A. OLD EXAMS

The test batteries given as written exams to firefighter candidates in 1971 and 1975 shall not again be used to test firefighter applicants.

B. HIRING

(1) The City promptly shall prepare a list of 102 minority persons to be offered positions as firefighters. This list shall include:

(a) The black and hispanic persons who filed applications for either the 1971 or 1975 test, who have not been offered but still seek employment with the Fire Department, and who pass both the agility test and medical examination to be administered by the City. Said agility test and medical examination shall be given to these persons within 120 days of this order, shall be preceded by both published notice and individual written notice to each of those black and hispanic persons who filed applications for the 1971 or 1975 firefighters test, and shall be no more rigorous than those that have been administered to the firefighters hired since January 1, 1971.

(b) Sufficient additional minority persons chosen in accordance with this subparagraph to reach the total of 102 persons. The persons chosen under this subparagraph shall be individuals who prove to the special master that after January 1, 1971 they were deterred by the City's discriminatory practices from applying to take either the 1971 or 1975 test, and who pass both the agility test and medical examination to be administered by the City. The following procedure shall be used to identify these persons:

(i) The special master shall, in a manner he deems appropriate, publicize the fact that he will be accepting applications from minority persons who claim that January 1, 1971 they were deterred by the City's discriminatory practices from filing applications for either the 1971 or 1975 firefighters test. The special master shall set and publicize a reasonable deadline for the submission of such applications.

(ii) The special master shall process the applications in a manner consistent with this opinion, and may hold hearings or other proceedings as he deems appropriate.

(iii) Each individual applicant shall bear the burden of proving by a preponderance of the evidence that he or she would have applied but for the City's discriminatory practices.

(iv) The special master need not process every application, but may choose among them at random until sufficient applications have been processed to complete the list of 102 minority persons to be offered employment.

(v) The agility test and medical examinations shall be administered to persons chosen by the special master at a time to be determined by the special master, and shall be preexamined. The agility test and medical examination shall be no more rigorous than those that have been administered to firefighters hired since January 1, 1971.

(c) If the procedures under subparagraphs (a) and (b) of this paragraph fail to produce sufficient individuals to fill the 102 minority persons to be offered employment.

(2) Notwithstanding the above, the City shall not be obligated to place on the list the name of anyone who

(a) on or before the date of the exam for which he or she applied or would have applied but for the City's discrimin ation

(i) was not eighteen years of age;

(ii) had not graduated from high school or earned a high school equivalency certification;

(iii) did not possess a valid Connecticut driver's license; or

(iv) had not been a bona fide resident of Bridgeport for the past year, or

(b) does not possess a valid Connecticut driver's license on the date the name otherwise would be placed on the list, but

(c) nothing in this paragraph shall alter or limit the City's obligation ultimately to place 102 names on the list.

(3) As quickly as possible within the limits of the City's ability to train new firefighters, the City shall offer the 102 persons on the list active employment as firefighters and shall place those who accept on active duty. The City shall make a good faith effort to maximize its ability to train firefighters. No other individuals shall be hired as firefighters until all of the individuals on the list have been offered active employment.

(4) Subsequent appointments to the rank of firefighter shall be made in strict accordance with Titles VI and VII of the Civil Rights Act in 1964.

(5) The City actively shall recruit minority persons to compete for future vacancies in the Fire Department.

(6) This Court shall retain jurisdiction over this case until the provisions of this Order have been complied with.

C. SENIORITY

[16] The City is prohibited from giving any promotional examinations to firefighters hired from lists generated by the 1971 or 1975 tests until such time as all the firefighters hired pursuant to B(1)(a) & (b) become qualified to take the promotional examination for the positions of Pump Engineer and Lieutenant, the Court is not opposed to a reduction of this requirement. The plausibility of producing the time-in-grade requirement by establishing an improved training program for all firefighters involves a decision that must be left to the experienced judgment of the authorities in the Fire Department. Until such time as promotional examinations are administered, the City may fill promotional vacancies on an acting or provisional basis, except that acting or provisional supervisors shall not be given any preference in the selection of permanent supervisors. In selecting acting or provisional supervisors, the City is urged to take cognizance of the prior fighting experience of a number of the plaintiffs.

D. BACK PAY

(1) The City promptly shall generate a list of up to 102 persons to be awarded back pay. This list shall include:

(a) Each of the persons whose name is placed on the hiring list pursuant to B(1)(a) or (b).

(b) If fewer than 102 persons qualify under subparagraph (a) of this paragraph, additional minority persons chosen in accordance with this subparagraph up to a maximum of 102. Persons chosen in accordance with this subparagraph shall be minority persons who applied to take either the 1971 or 1975 exam whose names are not placed on the hiring list pursuant to B(1)(a) but who prove to the special master, by a preponderance of the evidence, that on the date of the exam for which they applied, they

(i) were eighteen years of age,

(ii) had graduated from high school or earned a high school equivalency certification,

(iii) possessed a valid Connecticut driver's license.

(iv) had been a bona fide resident of Bridgeport for the past year, and

(v) would have passed the agility test and medical examination administered to applicants who did pass one of the exams.

If fewer than 102 individuals qualify for back pay under subparagraph (a) of this paragraph, the special master shall notify each of the individuals potentially eligible for back pay under this subparagraph that they may file applications for back pay awards, and shall set a reasonable deadline for the filing of such applications. He need not process every application, but may choose among them at random until sufficient applications have been processed to fill the total of 102 places on the back pay list.

(c) If fewer than 102 individuals qualify under subparagraphs (a) and (b) of this paragraph, additional minority persons chosen in accordance with this subparagraph up to a maximum of 102. Persons chosen in accordance with this subparagraph shall be minority persons whose names are not placed on the hiring list pursuant to B(1)(b) but who prove to the special master by a preponderance of the evidence that but for the defendants' discriminatory practices they would have applied to take either the 1971 or 1975 exam, and that on the date of the exam for which they would have applied they

(i) were eighteen years of age,

(ii) had graduated from high school, or earned a high school equivalency certification,

(iii) possessed a valid Connecticut driver's license,

(iv) had been a bona fide resident of Bridgeport for the past year, and

(v) would have passed the agility test and medical examination administered to applicants who did pass one of the exams.

If fewer than 102 individuals qualify for back pay under subparagraphs (a) and (b) of this paragraph, the special master, in a manner he deems appropriate, shall publicize the fact that he will be accepting applications. He need not process every application, but may choose among them at random until sufficient applications have been processed to fill the total of 102 places on the back pay list.

(d) If fewer than 102 individuals qualify under subparagraphs (a), (b), & (c) of this paragraph, the remaining places on the back pay list shall remain vacant.

(3) For the purposes of this order, back pay shall include

(a) the sum of the value of all regular and overtime wages, fringe benefits, pension benefits, and all other benefits to which firefighters are or were entitled under union contracts, including all increments, together with interest and, for those individuals whose names are on the hiring list established pursuant to this order, "front pay" until the date the individual is offered active employment.

(b) reduced by the sum of amounts earned or earnable with reasonable diligence and amounts of any welfare or unemployment compensation received.

(4) The individuals whose names are on the list who either applied to take or were deterred by defendants' discriminatory practices from applying to take the 1971 test shall be awarded back pay from October, 1973 (two years prior to the filing of the first complaint with the EEOC).

(5) The individuals whose names are on the list who either applied to take or were deterred by defendants' discriminatory practices from applying to take the 1975 test shall be awarded back pay from October, 1976 (when the first firefighter was hired from the 1975 list).

(6) While considerations of back pay liability may not enter into determining whose names shall be placed on the list, the City may, if it chooses, offer active employment to those on the hiring list in an order that will minimize its liability for "front pay." It would seem to make sense in terms of both economics and social policy for the City to offer active employment first to those with the least present income.

479 F. Supp. at 115-19 (footnotes omitted).

the 1971 and 1975 exams, set immediate minority hiring goals for the City, required the active recruitment of minority firefighters and the hiring of firefighters on a nondiscriminatory basis after the immediate goals were met, and awarded backpay and seniority relief to victims of the City's discrimination.

After reviewing certain of this Court's decisions in employment discrimination cases, the court concluded that the City's long history of egregious race discrimination warranted the issuance of a race-conscious hiring order, and that the court would be shirking its duty were it not to order affirmative relief to remedy past effects of discrimination. The court stated that its own aims were to grant redress to the victims of discrimination, to prevent future discrimination, and to persuade potential minority candidates that future applications for employment in the Bridgeport fire department would not automatically be rejected. The court expressly declined, however, to impose a hiring quota, which it defined as an order requiring the relatively permanent use of a specified hiring ratio. Rather, the court determined to set hiring goals for the City, which would lapse when the specified number of minority offers had been made, concluding that the imposition of such goals was "the only effective means of remedying past discrimination." *Id.* at 114. The court elaborated as follows:

> [T]his Court is of the opinion that merely ordering nondiscriminatory hiring in the future, even coupled with the requirement that the City actively recruit minority candidates, would be inadequate either to remedy past discrimination or "to assure prospective minority candidates that applying is no longer futile." *Association Against Discrimination in Employment* v. *City of Bridgeport, supra*, 594 F.2d at 311 n.13. "The effects of . . . past violation[s] of the minority's rights cannot be eliminated merely by prohibiting future discrimination, since this would be illusory and inadequate as a remedy. Affirmative action is essential." *Rios* v. *Enterprise Association*

Steamfitters Local 638, [501 F.2d 622, 631 (2d Cir. 1974)].[14]

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[14]In its opinion, this Court indicated that "there appears to be no bad faith on the part of defendants in using the exam or selecting the respected management consulting firm of Hay to develop the exam." 457 F. Supp. at 757. Defendants and defendants-intervenors now argue that the imposition of a hiring order would be inconsistent with this prior finding of good faith. Good faith however, is not a defense to a charge of discrimination based on the use of discriminatory tests. *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 432 (1971). And while good faith may be a factor to be considered in fashioning a remedy, the prior finding of good faith did not apply to defendants' lack of recruitment of minority applicants or treatment of individual minority persons.

Id. at 113-14.

In setting the hiring goals for the City, the court looked to the period during which violations had been found and to the ratio between Bridgeport's minorities and nonminorities. On the basis of its ruling that the City's violations of Title VI dated back to January 1, 1971, the court selected the period starting on that date as its time frame. Within that period, the court observed that the City had hired 152 white firefighters, one hispanic firefighter, and three black firefighters. Having noted at the outset of its opinion that black and hispanic persons in 1975 comprised approximately 41% of Bridgeport's labor force, the court observed that "[t]he hiring of an additional 102 minority persons would create a situation in which the percentage of minority firefighters hired since January 1, 1971 roughly

would equal the percentage of minority persons in the population of the City." *Id.* at 115 (footnote omitted).[10]

The court therefore ordered the City to compile a list of 102 persons to whom firefighter positions are to be offered.[11] The list is to be comprised, first, of those minority individuals still seeking to be firefighters who filed applications for either the 1971 or 1975 exam and who can pass the City's agility test and medical examination; if there are fewer than 102 such persons, the list is to include minority persons who can prove to a special master that they were deterred by the City's discriminatory practices from applying to take either the 1971 or the 1975 exam, and who can pass the agility test and medical exam; and finally if the total number of applicants and deterred would-be applicants is less than 102, additional minority persons, iden-

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[10]In answer to this Court's question as to the effect of the interim orders permitting the hiring of 84 firefighters from the 1975 test list, the district court found that

> [p]laintiffs agreed not to seek to enjoin defendants from hiring firefighters from the 1975 list, provided that defendants warranted that there was and would remain an immediate need and adequate funding for a number of firefighters equal to the number actually hired pursuant to the agreement.

479 F. Supp. at 105 n.4. It concluded that the defendants did not thereby agree to quota-type relief or concede that any relief would be appropriate, and the plaintiffs did not agree that the City would not be liable for backpay.

[11]Testimony at the hearing had indicated that there were currently 121 vacancies, although not all vacancies could be filled simultaneously.

tified by a method to be devised by the City with the approval of the court, are to be added until the total reaches 102.[12]

The order requires the City, as quickly as possible within the limits of its ability to train new firefighters, to offer the 102 persons on the list active employment in the fire department and prohibits it from hiring any other individuals as firefighters until all of the persons on the list have been offered such employment.

In addition, the court ordered the City to compile a list of up to 102 persons to be awarded backpay, comprised first, of persons who were applicants or deterred would-be applicants for the 1971 or 1975 exam whose names are placed on the list of persons to whom employment must be offered; if there are fewer than 102 such persons, the list is to include minority persons who applied to take the 1971 or 1975 test, but whose names are not on the list of persons to be offered positions, providing they prove to the special master by a preponderance of the evidence that they met the City's age, residency, driver's license, education, agility and medical requirements on the date of the exam for which they applied; and finally, if there are fewer than 102 persons in those two groups, the list is to include minority persons not on the list of those to be offered positions, who prove to the special master by a preponderance of the evidence that but for the City's discriminatory practices they would have applied to take either the 1971 or 1975 exam, and that on the date of such exam they met the city's age, residency, driver's license, education, agility and medical requirements. To the extent that all of these groups combined yield fewer than 102 persons, the remainder of the backpay list is to remain vacant. For those who took or were deterred from taking the 1971 exam, backpay was awarded for the period beginning in October 1973, *i.e.*, two years prior to the filing of the first complaint with EEOC; for

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[12]The order allowed exclusion of persons who did not meet the City's requirements as to age, residence, education, and possession of driver's license.

individuals who took or were deterred from taking the 1975 exam, backpay was awarded for the period beginning in October 1976, the date the first firefighter was hired from the 1975 list.

In recognition of the seniority loss suffered by the victims of the City's discrimination, the court prohibited the City from giving any promotional examinations to firefighters hired pursuant to the 1971 or 1975 exams until all new minority firefighters who took or were deterred from taking the 1971 or 1975 exams have become qualified to take the promotional examinations. The City was not prohibited from reducing its time-in-grade requirements for promotional exams so as to advance the time at which the new hirees would become eligible, or from filling any promotional vacancies on an "acting or provisional" basis, so long as any such acting or provisional supervisors were not given any preference in the selection of permanent supervisors.[13]

E. Issues on This Appeal

On appeal, defendants do not contest the district court's conclusion that the City is liable for race discrimination under the Revenue Sharing Act dating back to January 1, 1973,[14] nor do

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[13]On October 1, 1979, the district court granted a conditional stay of its judgment pending appeal. The conditions attached to the stay included a provision that "[t]he defendants hire at least two minorities for every white (defendants may hire a total of twenty one persons of whom 14 are minority and 7 are white)." This Court subsequently continued the stay on condition that the City satisfy the conditions set out therein. We are informed that additional hiring of firefighters has in fact taken place.

[14]Defendants purported to appeal from all portions of the district court's "Memorandum of Decision and Order." The City, however, has not asserted any error in the court's holding it liable for violation of the Revenue Sharing Act. BFME, in its brief on this appeal, merely states its unelaborated contention that the Revenue Sharing Act does

they contest the conclusion that the 1975 exam was unlawful under Title VII. They contend, however, with respect to both Title VI and Title VII, that the district court erred in holding the City liable for discrimination prior to 1975. In addition, defendants challenge various aspects of the remedy, arguing that the remedy constitutes an impermissible hiring quota, that the numerical hiring order is overbroad and requires the City to hire unqualified individuals, that the promotional freeze places an undue burden on a small, readily identifiable group of nonminority employees, and that the backpay relief is overinclusive and insufficiently tailored to the alleged violations.

The plaintiffs have cross-appealed from two aspects of the relief ordered. They contend that the court erred in placing on the minority candidates the burden of proving that they met the City's nondiscriminatory employment requirements in order to receive backpay, and they contend that the district court should have awarded constructive seniority for job placement, benefits, and other purposes, to persons hired pursuant to the order.

As to liability, we affirm the holding that the City has violated Title VII since 1972, but vacate the district court's ruling that the City violated Title VI. As to remedy, we affirm the district court's general remedial plan, but remand for modification as to the number of minority persons to whom employment must be offered as to various aspects of the backpay and seniority awards.

I. LIABILITY UNDER TITLE VII

We turn first to defendants' contention that the district court erred in finding the City liable for Title VII violations dating back to March 24, 1972, the date on which Title VII became ap-

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not provide a basis for liability in this action; it states that since the district court did not impose a remedy under that statute, BFME does not address it. It should be noted that this Court has recently held that backpay is a remedy available to a successful plaintiff under the Revenue Sharing Act. *Cohen* v. *West Haven Board of Police Commissioners*, 638 F.2d 496 (2d Cir. 1980).

plicable to the City. Defendants do not contend here that the 1975 exam or the 1971 exam was job related or that the impact of either exam was not discriminatory. Rather they argue principally that it is not permissible to hold the City liable under Title VII for hiring from an eligibility list based on a pre-Title VII test, and that the Title VII claims based on hiring pursuant to the 1971 exam were not timely filed under § 706 of the Act.[15] Neither contention has merit.

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[15]Defendants make two additional arguments which merit but brief mention. First, they argue that questions of pre-1975 discrimination were never litigated in the district court. This contention is baseless. The complaint's challenge to the City's use of unlawful exams was not limited to the 1975 exam. While the 1971 exam was not mentioned in haec verba, several of the allegations related to that exam rather than the 1975 exam. The defendants, in turn, asserted a two-year statute of limitations with respect to acts occurring more than two years prior to July 1976. In pretrial discovery, plaintiffs asked numerous questions about the City's practices dating back to 1965, with interrogatories, for example, asking a breakdown of test applications, by race, for each year from 1965 to 1975. At trial, plaintiffs' first post-pedigree question to their first witness asked about his taking the 1971 exam. Defendants' immediate objection was followed by colloquy in which plaintiffs point out *inter alia*, that post-Title VII hiring had occurred pursuant to the 1971 test. The court overruled defendants' objection and thereafter a considerable amount of evidence was received with respect to (a) the nature of the firefighter exams given in 1965, 1968,and 1971; (b) the pass rates of minority and nonminority persons who took these exams; (c) the fact that the City made no attempt to validate any of its exams prior to 1972; and (d) various other aspects of the City's "'long continued'" history of discrimination.

In addition we reject defendants' contention that the doctrine of laches bars relief for the pre-1975 hirings. Assuming, without deciding, that the doctrine applies in Title VII cases, *see, e.g., Occidental Life Ins. Co.* v. *EEOC*, 432 U.S. 355, 373 (1977); *Albermarle Paper Co.* v. *Moody, supra*, 422 U.S. at 424-25; *Boone* v. *Mechanical Specialties Co.*, 609 F.2d 956, 958-59 (9th Cir. 1979); *Bernard* v. *Gulf Oil, Inc.*, 596 F.2d 1249, 1256-58 (5th Cir.), *rehearing en banc granted*, 604 F.2d 449 (5th Cir. 1979), *aff'd in relevant part on*

A. Liability for Post-Title VII Hiring Based on the 1971 Exam

Defendants contend that the City cannot be held liable for any hiring pursuant to the list generated by its 1971 firefighters exam because that exam predated the applicability of Title VII to the City, and because its hiring from the 1971 exam was therefore pursuant to a "bona fide merit system," which is made lawful by § 703(h) of the Act. Neither precedent nor reason supports these contentions.

Section 703(a) of the Act makes unlawful an employer's failure or refusal to hire an individual on the basis of race. When it was enacted in 1964, this provision did not apply to municipalities. The provision became applicable to the City on March 24, 1972, by the passage of Pub. L. 92-261, § 2(1), 86 Stat. 103, which simply broadened the definitional provisions so as to make Title VII applicable to municipalities and certain other entities not previously covered. Nothing in the broadened definition suggested that a continued application of past discriminatory standards was permissible; clearly the intention was to the contrary. Thus, in *Guardians Association* v. *Civil Service Commision*, 633 F.2d 232 (2d Cir. 1980) (*"Guardians III"*),[16] we categorically rejected the notion that a municipal employer who held a discriminatory exam prior to March 24, 1972, could lawfully continue after that date to invoke the results of the discriminatory exam to make employment ap-

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rehearing en banc, 619 F.2d 459 (5th Cir. 1980), *cert. granted*, 49 U.S.L.W. 3428 (U.S. Dec. 8, 1980), we note that defendants did not assert this defense in the district court, and that they have failed in this Court to make any showing of substantial prejudice such as is ordinarily necessary to invoke such a defense.

[16]The *Guardians* litigation had resulted in two prior appeals to this Court, reported at 490 F.2d 400 (2d Cir. 1973) (affirming denial of preliminary injunction), and at 562 F.2d 38 (2d Cir. 1977) (mem.) (vacating preliminary injunction and remanding for reconsideration in light of *International Brotherhood of Teamsters* v. *United States*, *supra*).

pointments. We observed that to conclude otherwise would permit an employer, "with impunity, [to] refuse to hire in a timely manner hundreds of minority applicants, solely because of performance on an invalid test, years after Title VII explicitly forbade the *use* of testing results to discriminated in hiring." *Id.* at 252 (emphasis in original.

Nor does § 703(h) of the Act legitimate defendants' post-Title VII hiring. That section provides in pertinent part as follows:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test *provided that such test*, its administration *or action upon the results is not* designed, intended or *used to discriminate* because of race, color, religion, sex or national origin.

42 U.S.C. §2000e-2(h) (emphasis added). The City seeks to characterize its 1971 exam as a "bona fide...merit system," in order to perpetuate its ability to use that test's results without violating Title VII. The district court, however, found that the 1971 exam was not job related and that it had a discriminitory impact—findings that defendants do not challenge on this appeal. Thus, bypassing the question whether the term "merit system" even applies to hiring decisions, as contrasted with post-hiring decisions, *see Guardians III, supra*, 633 F2d at 251-52, we reject the City's attempt to immunize its post-Act hiring by reference to § 703(h) for two reasons. First, since the

1971 test was "used" to discriminate against minorities, it is expressly excluded from § 703(h). More fundamentally, it would defy reason to characterize as a "bona fide merit system" a test that does not measure the fitness of those who take it for the positions to be filled according to its results. *See id.* at 252 ("[A] hiring system that ranks applicants according to their performance on discriminatory examinations cannot claim the status of a "bona fide merit system" within the meaning of the statute.") Thus, defendants' argument, like that of the defendants in Guardians III, is not supported by the decision of the Supreme Court in *International Brotherhood of Teamsters* v. *United States:*

> Unlike the seniority system in *Teamsters*, the merit system in the instant case does not measure what it purports to measure. The failing of the department's hiring system is therefore not that it perpetuates *the effects* of past discrimination, but rather that it perpetuates discrimination. It is one thing to utilize a system that locks in the effects of past discriminatory hiring decisions; it is a very different thing to lock in a discriminatory hiring decisions; it is a very different thing to lock in a discriminatory method of making hiring decisions... Nothing in *Teamsters* implies that by labelling a non-job-related system of employee selection a 'merit' system, an employer can avoid the command of Title VII that it henceforth select its workforce in a non-discriminatory fashion.

Guardians III, supra, 633 F.2d at 253 (emphasis in original).

Accordingly, we conclude that the City could be held liable under Title VII for its post-Act appointments based on the 1971 test.

B. The 300-Day Limitation

Defendants' other principal challenge to the district court's ruling under Title VII is based on the statute of limitations established by § 706(e) of the Act. That section provides that in order to maintain a suit under Title VII, a plaintiff must have filed a charge of discrimination with EEOC within 300 days of the alleged discriminatory act.[17] 42 U.S.C. § 2000e-5(e) (1976). *See, e.g., United Air Lines, Inc.* v. *Evans*, 431 U.S. 553, 555 n.4 (1977); *Cates* v. *Trans World Airlines, Inc.*, 561 F.2d 1064 (2d Cir. 1977). The City's last hirings based on the 1971 exam occurred on May 2, 1973, and there were no further hirings until after 1975. Plaintiffs' first EEOC charge pertaining to defendants' hiring practices was filed in October 1975. Defendants argue, therefore, that insofar as plaintiffs' claims relate to the 1973 and earlier hirings, they are barred by the 300-day period of limitations. This contention takes an impermissibly myopic view of the nature of the City's unlawful conduct.

As a general matter, the mere continuation of a discriminatory act's effects, when the act itself occurred prior to the pertinent limitations period, is not sufficient to support recovery under Title VII. *United Air Lines, Inc.* v. *Evans, supra*, 431 U.S. at 558. *See also Delaware State College* v. *Ricks*, 101 S. Ct. 498 (1980). The act that constitutes the violation must be "still fresh" within the statutory period. *Egelston* v. *State University College*, 535 F.2d 752, 755 (2d Cir. 1976). Thus, had the 1971 exam and the hiring on the basis of that exam been isolated acts of discrimination, defendants' statute of limitations argument would be well taken, even though the effects of that past discrimination were still being felt by reason of the resulting racial makeup of the fire department.

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[17] If the complaintant had not "initially instituted" proceedings before a statute antidiscrimination agency, the applicable limitations period is 180 days. 42 U.S.C. § 2000e-5(e) (1976). Defendants have not challenged the applicability of the 300 day period.

Where, however, the defendant has engaged in a continuous policy of discrimination, acts in furtherance of that policy are not viewed in isolation. In such circumstances if the charge has been filed no later than 300 days after the *last* act by the defendant pursuant to its policy, the plaintiff may recover for earlier acts of discrimination as well. *See Guardians III, supra*, 633 F.2d at 249; *Acha* v. *Beame*, 570 F.2d 57, 65 (2d Cir. 1978); *see also Smith* v. *American President Lines, Ltd.*, 571 F.2d 102 (2d *Cir. 1978)*. In *Acha* v. *Beame*, we stated this principle as follows:

> To succeed at trial, the appellants must be able to demonstrate a Title VII violation and within the period of the statute of limitations, or 300 day charge-filing period. But such a violation is not limited to hiring violations per se.
>
> A continuously maintained illegal employment policy may be the subject of a valid complaint until a specified number of days after the *last occurrence* of an instance of that policy... Furthermore, where an illegal policy is so maintained, relief for injuries sustained even before the beginning of the limitations period is appropriate.

570 F.2d at 65 (emphasis in original; citations omitted).

There can be no doubt that the continuous-policy principle governs the present case. The district court made express findings as to several discriminatory acts by the City that occurred within 300 days of October 1975. These included the giving of the 1975 exam that was not job related and had discriminatory impact, and the individual acts of discrimination against several minority candidates who sought to take that exam in 1975. In addition, the court found that the City had "engaged in a continuing pattern and practice of post-Title VII discrimination...against black and hispanic persons," *id.* at 111-12; and that it had "engaged in a 'clear-cut pattern of long-continued and egregious racial discrimination,'" *id.* at

112. The court concluded as follows: "This Court also finds that the discrimination has been 'long-continued' whether one examines the entire history of the City's hiring of firefighters or only its post-Act conduct." *Id.* at 113.

In light of these findings, which are not clearly erroneous, the City's 1975 discriminatory acts cannot be divorced from its earlier acts or its overall history. We conclude that all of plaintiffs' Title VII claims are timely, and we affirm the ruling of the district court that the City violated Title VII from March 24, 1972, by making appointments after that date that had discriminatory impact, based on its discriminatory 1971 test.

IV. LIABILITY UNDER TITLE VI

The City has made essentially a threefold challenge to the district court's finding of liability under Title VI. It contends that is never had notice of, or an opportunity to litigate, the Title VI issues in the district court, that such claims are barred by the applicable statute of limitations or by laches, and that in any event, plaintiffs failed to prove a violation of that Title. Since we find merit in the last of these contentions we need not deal with the issue of timeliness, and we touch on the notice contention only in order to place in perspective the failure of proof.

The complaint filed by plaintiff clearly raised issues under Title VI. Paragraph 6(b) stated as follows:

> Bridgeport has received in the past and will receive in the future federal financial assistance including revenue sharing funds. It has spent a portion of these funds and intends to continue to spend a portion of such funds received in the future in the area of public safety, including the Fire Department.

And paragraph 17 alleged:

> Defendant's [*sic*] discriminatory practices violate the plaintiffs' rights not to be excluded from participation in, denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance, on account of race, color, or national origin, guaranteed by Title VI of the Civil Rights Act of 1964, 42 U.S.C. Section 2000d.

The City admitted the allegations of paragraph 6(b), and denied paragraph 17.

Much of the evidence presented by plaintiffs at trial related to the City's discriminatory practices between 1964, when Title VI took effect, and 1972 when Title VII became applicable to municipalities. For example, the record included the firefighters examinations given in 1965, 1968 and 1971, with data as to the numbers of minority and nonminority applicants who took and who passed those exams. This evidence was relevant not only as background for the Title VII claim, but also as proof of the Title VI claim. The latter relevance does not seem to have been entirely lost on the defendants; the City's posttrial memorandum began with the statement that the plaintiffs asserted claims under both Title VII and Title VI. We conclude that the defendants had more than adequate notice and opportunity to contest the Title VI claims at the initial trial in this case, and that the district court was entitled to consider these claims after the remand from this Court.[18]

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[18]Our prior opinion neither explicitly required nor forbade consideration of Title VI. Rather, our request that the district court clarify the theories on which any pre-1972 liability was found implicitly permitted the consideration on remand of any available theory.

As the record stands, however, we do not find that plaintiffs proved all of the elements of their Title VI claim.[19] Title VI, § 601 of the Civil Rights Act, states:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

42 U.S.C. § 2000d (1976). Section 602 of the Act imposes on agencies "empowered to extend Federal financial assistance to any program or activity" a duty to effectuate the provisions of the Title by issuing appropriate rules and regulations. 42 U.S.C. § 2000d-1. The enforcement power of the agencies under § 602, however, is limited by § 604 as follows:

> Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide emloyment.

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[19]The recent decisions in this Circuit have generally assumed the existence of a private right of action under Title VI. *See, e.g., Guardians III, supra*, 633 F.2d at 270-71 (Kelleher, D.J., concurring); *id.* at 274 (Coffrin, D.J., concurring); *Bryan* v. *Koch*, 627 F.2d 612 (2d Cir. 1980); *Lora* v. *Board of Education*, 623 F.2d 248 (2d Cir. 1980). Although the Supreme Court has not squarely held that a private right of action exists under Title VI, its recent decision in *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979), supports our view. There the Court in deciding that a private right of action existed under Title IX, relied in part on its conclusion that Congress, when it drafted Title IX, used Title VI as a model and believed that Title VI provided a private right of action.

42 U.S.C. § 2000d-3. This section in effect requires a logical nexus between the use of federal funds and the practice toward which agency action is directed. Although on its face § 604 limits the circumstances under which can be taken by an agency, plaintiffs have not argued that the provision is applicable only to agencies and not to private actions. Both plaintiffs' brief and the amicus brief of the government appear to assume that the "primary objective... to provide employment" limitation applies to private rights of action as well. We agree. We see no indication that Congress would not have intended that the logical nexus requirement exist with respect to private actions as well as agency action. Thus, for a claimant to recover under Title VI against an employer for discriminatory employment practices, a threshold requirement is that the employer be the recipient of federal funds aimed primarily at providing employment. *See Carmi* v. *Metropolitan St. Louis Sewer Dist.*, 620 F.2d 672, 674-75 (8th Cir.), *cert. denied*, 101 S. Ct. 249 (1980); *Trageser* v. *Libbie Rehabilitation Center, Inc.*, 590 F.2d 87, 88-89 (4th Cir. 1978), *cert. denied*, 442 U.S. 947 (1979).

The district court's findings with respect to Title VI did not touch on this requirement. The Court stated simply as follows:

> Defendants, in their answer, have admitted that federal funds have been received by the City and expended in the Fire Department. Plaintiffs have proven that such funds were received and expended in the Fire Department in each year between 1971 and 1977.

479 F. Supp. at 111. There was no finding that the funds were aimed primarily at providing employment. Thus, the findings do not adequately support the ruling on liability.

Nor would a finding as to the primary purpose of the federal funds have been supported by the properly received evidence of record. The complaint contained no express allegation as to the primary purpose of such funds, and hence there was no pleaded admission as to this element. Further, it appears that no

evidence as to the purpose of the federal funds was introduced at the earlier stages of this case. Prior to the evidentiary hearing on remand, plaintiffs apparently recognized that the record was deficient in this respect, stating as follows:

> The record is not clear with respect to the relevance of Title VI to this case, in that there is no evidence relating to receipt of federal funds by the City other than Revenue Sharing funds.

Plaintiffs therefore requested that the court accept evidence relating to Title VI at the hearing on remand. The district court, however, denied plaintiff's request. Its prehearing order limited the permissible evidence to other issues, and when plaintiffs nevertheless sought at the hearing to elicit testimony from the City's Comptroller on the subject of the City's use of federal funds, the court sustained the City's objection and dismissed the witness. The plaintiffs do not challenge this exclusion by the district court; to the contrary, they properly concede that "the scope of additional evidence, if any, was within the trial judge's discretion, which he did not abuse." (Appellees' Brief on Appeal at 21.)

Plaintiffs contend, however, that the record adequately reflects the use of federal funds under the Emergency Employment Act[20] for the purpose of employment in the City's fire department, because the district court stated that it would take judicial notice of the City's budget. While we reject the City's contention that the district court could not properly take judicial notice of the budget, we cannot see that any materials properly the subject of judicial notice provided the information that was required. Rule 20I(b) of the Federal Rules of Evidence

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[20]Plaintiffs' reference was to Pub. L. 92-54, § 2, 85 Stat. 147 (1971), which states that "[i]t is...the purpose of this Act to provide unemployed and underemployed persons with transitional employment in jobs providing needed public services during times of high unemployment..."

allows a court to take judicial notice of a fact that is not subject to reasonable dispute because it is either:

> (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

A municipality's published budget could qualify as a source of information whose accuracy cannot reasonably be questioned. What was presented to the court here, however, was a few photocopied pages of the City's "Public Employment Employee Roster," which did not readily reveal the primary purpose of federal funds received by the City. These pages merely listed names and addresses of individuals, together, apparently, with various City departments, and dates, and an assortment of other numbers that we find altogether cryptic. Nowhere on any of the photocopied pages is there any mention of the Emergency Employment Act, or any other indication that what is there reflected is federal funding primarily for employment.

The characterization of these pages as reflecting the receipt of federal funds for employment purposes comes strictly from the affidavit to which they were attached. This affidavit, submitted by a paralegal employed by plaintiffs' cousel, stated in pertinent part as follows:

> IV. My examination revealed that indeed, at least during the years 1971 and 1972, some federal money was used by the City to hire personnel for the Fire Department. This money was provided to the City through the Emergency Employment Act of 1971.
>
> V. The hiring of Fire Department personnel with Emergency Employment Act money was recorded in the "Public Employment Roster" for the years 1971 and 1972. Photo copies of relevant pages of this

> roster along with my own added notations are attached.

Such an affidavit, of course, is not a source whose accuracy is beyond reasonable question, and the facts recited therein could not properly have been judicially noticed.[21]

We conclude that the affidavit could not, and the photocopies *did* not, supply the evidence required to support plaintiffs' Title VI claim. We therefore vacate the court's ruling that the City violated Title VI.

V. THE REMEDIAL ORDER

The district court's remedial order grants what may be viewed as three classes of relief: (1) compliance relief, *i.e.*, that designed to assure future compliance with Title VII; (2) affirmative relief, or that designed to remedy the effects of past discrimination; and (3) compensatory relief, that which is designed to "make whole" the victims of past discrimination. The last two categories may overlap to some extent, although their intended functions differ. The first two categories differ principally as follows:

> Compliance involves restricting the use of an invalid exam, specifying procedures and standards for a new valid selection procedure, and authorizing interim hiring that does not have a disparate racial impact. Affirmative relief involves interim hiring at any ratio greater than what is necessary just to avoid a disparate racial impact and any required long-term hiring targets or ratios.

Guardians Ass'n v. *Civil Service Comm'n*, 630 F.2d 79, 108 (2d Cir. 1980) (*"Guardians IV"*) (footnotes omitted).

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[21] It does not appear that the court relied in any way on the affidavit, since it made no finding as to the purpose of the City's receipt of federal funds.

The principal element of compliance relief granted by the district court is the injunction against any further use of the 1971 and 1975 written exams. In addition, following the City's compliance with the immediate affirmative relief granted, the City is ordered actively to recruit minority persons to compete or firefighter positions and to hire on a nondiscriminatory basis. These portions of the order are not challenged by the defendants.

The principal affirmative relief provided by the order is the requirement that the City compile a list of 102 minority candidates to whom firefighter positions must be offered before anyone else may be hired. This requirement provides compensatory relief as well, since priority is given, in the compilation of the list, to actual victims of the City's discrimination. Additional compensatory relief is given in the form of a suspension of promotional examinations until all the new minority firefighters who were victims of the City's discrimination become eligible to take them, and the awarding of backpay up to 102 persons who were victims of the City's discrimination. The defendants attack all phases of the provisions granting affirmative and compensatory relief. The plaintiffs challenge limited aspects of the district court's order with respect to seniority and backpay.

The primary purposes of Title VII are to prevent discrimination and achieve equal employment opportunity in the future, *see International Brotherhood of Teamsters* v. *United States, supra*, 431 U.S. at 364; *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 417 (1975); *Griggs* v. *Duke Power Co., supra*, 401 U.S. at 429-30, and to make whole the victims of past discrimination, *see, e.g., International Brotherhood of Teamsters* v. *United States, supra; Franks* v. *Bowman Transp. Co.*, 424 U.S. 747, 764 (1976); *Albemarle Paper Co.* v. *Moody, supra*, 422 U.S. at 418. Our evaluation of the district court's order must begin with the recognition that "[o]nce a violation of Title VII is established, the district court possesses broad power as a court of equity to remedy the vestiges of past discriminatory practices." *Rios* v. *Enterprise Ass'n Steamfitters Local 638,*

supra, 501 F.2d at 629. *See also EEOC* v. *Local 638*, 565 F.2d 31, 34 (2d Cir. 1977); *Vulcan Society of the New York City Fire Dep't, Inc.* v. *Civil Service Commission*, 490 F.2d 387, 399 (2d Cir. 1973); *Bridgeport Guardians, Inc.* v. *Members of the Bridgeport Civil Service Comm'n*, 482 F.2d 1333, 1340 (2d Cir. 1973), *cert. denied*, 421 U.S. 991 (1975). Our function is not to exercise our own discretion, but to determine, in light of the purposes of the Act, whether the district court judge has abused his. *Cf. Albemarle Paper Co.* v. *Moody, supra*, 422 U.S. at 421-22.

Because we have vacated the district court's ruling that the City violated Title VI, we find that the number of persons to whom positions must be offered and to whom backpay must be paid should be reduced. In addition, we find that certain aspects of the seniority and backpay awards should be modified. In all other respects, however, we conclude that the remedial order was a proper exercise of the district court's discretion.

A. The Propriety of Affirmative Relief

Defendants' attack on the nature of the affirmative relief, as distinct from the size of the list, asserts principally that the order imposes a quota in violation of § 703(j) of the Act and that it impermissibly discriminates against nonminority individuals. Analysis of the order, however, reveals that the court has not imposed a quota; and the record in this case persuades us that the type of relief ordered is fully justified.

Despite the considerable deference to which a district court's remedial design is entitled, this Court has subjected numerical hiring orders to particularly close scrutiny. As we noted in the prior appeal in this case, cases involving hiring quotas "have been the occasion for some strong differences of opinion" among members of this Court. *ADE* v. *Bridgeport, supra*, 594 F.2d at 310. *Compare Fullilove* v. *Kreps*, 584 F.2d 600, 606-7 (2d Cir. 1978), *aff'd sub nom. Fullilove* v. *Klutznik*, 100 S. Ct. 2758 (1980); *Chance* v. *Board of Examiners*, 534 F.2d 993, 1002-03 (2d Cir. 1976) (Oakes, J. dissenting), *cert. denied*, 431

U.S. 965 (1977); *Kirkland* v. *New York State Dep't of Correctional Services*, 531 F.2d 5, 8 (2d Cir. 1975) (Mansfield, J., dissenting from denial of rehearing en banc); and *Patterson* v. *Newspaper & Mail Deliverers' Union*, 514 F.2d 767 (2d Cir. 1975), *cert. denied*, 427 U.S. 911 (1976), *with Chance* v. *Board of Examiners, supra* (majority opinion); *Patterson* v. *Newspaper & Mail Deliverers' Union, supra*, 514 F.2d at 776 (Feinberg, J., concurring); *Rios* v. *Enterprises Ass'n Steamfitters Local 638, supra*, 501 F.2d at 634-39 (Hays, J., dissenting). The Supreme Court's recent opinions in *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978) and *United Steelworkers of America* v. *Weber*, 443 U.S. 193 (1979), provide no clear guidance as to how these differences should be resolved. *Bakke*, which revealed "strong differences of opinion" in the Supreme Court as well, did not involve a temporary quota or goal imposed as a specific remedy to an adjudicated violation of Title VII. *Cf.* 438 U.S. at 300-02 (opinion of Powell, J.); *see also Fullilove* v. *Klutznik, supra*, 100 S. Ct. at 2784-85 (Powell, J., concurring). And in *Weber*, which involved an affirmative action plan that a private employer had adopted voluntarily, the Court specifically excluded from the scope of its inquiry "what Title VII requires or...what a court might order to remedy a past proved violation of the [Civil Rights] Act." 443 U.S. at 200.

Despite the differences of opinion in the Supreme Court and in our own Court, several guiding principles emerge from the cases. First, since a primary purpose of Title VII is to make whole the past victims of discrimination, "[i]nitial consideration should be given to relief for the plaintiffs and those similarly situated," that is, to identifiable victims of the employer's discriminatory actions. *Guardians IV, supra*, 630 F.2d at 108. Section 706(g) of the Act makes it clear that such make-whole relief may include an order requiring the hiring of past

discriminatees. 42 U.S.C. § 2000e-5(g).[22] In addition, the court may seek to eradicate the discriminatory effects of proven Title VII violations, *see, e.g., Rios* v. *Enterprise Ass'n Steamfitters Local 638, supra*, 501 F.2d at 633 ("elimination of discriminatory effects...is permissible"), by eliminating the

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[22]Section 706(g) provides:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex or national origin or in violation of [section 704(a) of the Act].

The requirement that an employer have discriminated "intentionally" in order for the provisions of § 706(g) to come into play means not that there must have been a discriminatory purpose, but only that the acts must have been deliberate, not accidental. *See Williams* v. *General Foods Corp.*, 492 F.2d 399, 406-07 (7th Cir. 1974), and cases cited therein. *See also Franks* v. *Bowman Transp. Co., supra*, 424 U.S. at 762-66, 770-71; *Albemarle Paper Co.* v. *Moody, supra*, 422 U.S. at 422-23.

disparate impact of a discriminatory exam. *See Guardians IV, supra*, 630 F.2d at 108.

Second, the remedy for a proven violation of anti-discrimination laws need not be "color-blind" but "may in the appropriate case include a racial or ethnic factor." *Fullilove* v. *Klutznick, supra*, 100 S. Ct. at 2777 (opinion of Burger, C.J.). Section 706(g) specifically provides that upon finding a violation a court may "order such affirmative action as may be appropriate," 42 U.S.C. § 2000e-5(g), and § 703(j) of the Act does not bar race-conscious relief. That section provides, in pertinent part, as follows:

> Nothing contained in this subchapter shall be interpreted to require any employer...to grant preferential treatment to any individual or to any group...on account of an imbalance which may exist with respect to the total number or percentage of persons of such race...in comparison with the total number or percentage of persons of such race...in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

42 U.S.C. § 2000e-2(j). As this Court has stated many times, what § 703(j) proscribes is racial preference where racial imbalance is not related to discrimination; but it does not proscribe imposition of a racial goal as an exercise of remedial authority under § 706(g) to correct an imbalance that has resulted from discrimination. *See, e.g., EEOC* v. *Local 638, supra*, 532 F. 2d at 827-28; *Rios* v. *Enterprise Ass'n Steamfitters Local 638, supra*, 501 F.2d at 630-31; *United States* v. *Wood, Wire and Metal Lathers Int'l Union, Local 46, 471 F.2d 408, 412-13 (2d Cir.), cert. denied*, 412 U.S. 939 (1973). And while some members of this Court have expressed reservations as to the proper interpretation of § 703(j), *see e.g., EEOC* v. *Local 638, supra*, 532 F.2d at 834 (Feinberg, J., concurring); *Rios* v *Enterprise Ass'n Steamfitters Local 638, supra*, 501 F.2d at 636-37 (Hays, J., dissenting), they have not, to our knowledge,

suggested that it bars a provision that not only gives affirmative relief but simultaneously awards compensatory relief by requiring the hiring of the identifiable victims of discriminatory employment practices.

Balanced against the broad equitable power to remedy Title VII violations is a recognition that "the use of...[racial] goals means, in practice, that certain nonminority persons will be kept out...solely on account of their race or ethnic background" and that this impinges on the basic principle "that individuals are to be judged as individuals, not as members of particular racial groups." *EEOC* v. *Local 638, supra*, 532 F.2d at 827. Accordingly, several members of this Court have stressed that quotas or goals must be approached only with reluctance, or at least in a "gingerly" fashion. *See, e.g., Kirkland* v. *New York State Dep't of Correctional Services*, 520 F.2d 420, 427 (2d Cir.), *rehearing en banc denied*, 531 F.2d 5 (2d Cir. 1975), *cert. denied*, 429 U.S. 823 (1976); *EEOC* v. *Local 638, supra; Vulcan Society, supra*, 490 F.2d at 398-99. In *Kirkland*, it was suggested that racial quotas are appropriate only when there has been "a clear-cut pattern of long-continued and egregious racial discrimination" and the reverse discriminatory effects are not felt by "a small number of readily identifiable" individuals. 520 F.2d at 427, 429. *See also EEOC* v. *Local 638, supra*, 532 F.2d at 827-28.

Yet the mere possibility that a race-conscious remedy may have an adverse impact on nonminority individuals does not render that remedy impermissible. In the context of seniority relief, for example, the Supreme Court has warned that the denial of relief

> to identifiable victims of racial discrimination on the sole ground that such relief diminishes the expectations of other, arguably innocent, employees would if applied generally frustrate the central "make whole" objective of Title VII.

Franks v. *Bowman Transp. Co., supra*, 424 U.S. at 774. *See also Kirkland* v. *New York State Dep't of Correctional Services, supra*, 531 F.2d at 8 (Mansfield, jr., dissenting from denial of rehearing en banc).

Turning to the record in the present case, we are persuaded that the type of affirmative relief ordered here — *i.e.*, that 102 minority candidates, to be identified, be offered firefighter positions before anyone else may be hired — fits comfortably within the foregoing framework. The order gives primary consideration to actual victims of the City's past discrimination and was carefully tailored to fit the violations found. The City's tests, policies and practices unlawfully discriminated against minority candidates who applied; its discriminatory policies and practices unlawfully deterred other minority candidates from applying.[23]

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[23]Those who can prove they were deterred from applying for employment by an employer's discriminatory practices are actual victims of discrimination and are entitled to the same restitution as minority applicants. *See International Brotherhood of Teamsters* v. *United States, supra*, 431 U.S. at 364-66 The Court stated:

> The effects of and the injuries suffered from discriminatory employment practices are not always confined to those who were expressly denied a requested employment opportunity. A consistently enforced discriminatory policy can surely deter job applications from those who are aware of it and are unwilling to subject themselves to the humiliation of explicit and certain rejection.
>
> If an employer should announce his policy of discrimination by a sign reading "Whites Only" on the hiring-office door, his victims would not be limited to the few who ignored the sign and subjected themselves to personal rebuffs. The same message can be communicated to potential applicants more subtly but just as clearly by an employer's actual practices—by his consistent discriminatory treatment of actual applicants, by the manner in which he publicizes vacancies, his recruitment techniques, his responses to casual or tentative inquiries, and even by

The court's order reqires that the first persons to be placed on the list be minority candidates who applied to take the 1971 or 1975 exam and who were not offered, but still seek, employment in the fire department.[24] The next persons to be included are minority candidates who were unlawfully deterred from applying. to this extent the affirmative relief ordered by the district court seeks not only to remedy the effects of past discrimination but to further the "make whole" purpose which is central to the statutory scheme.

At this stage, of course, it cannot be known whether the total number of minority candidates who failed the exam or were deterred from applying is greater or less than the number of places on the required offering list. If the total exceeds the number of places, the affirmative relief ordered by the court will

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> the racial or ethnic composition of that part of his work force from which he has discriminatorily excluded minority groups.

Id. at 365 (footnote omitted). Here, the district court found that the City had actively deterred interested minority candidates, a finding that is not clearly erroneous. Indeed, defendants merely content themselves with characterizing this finding as "dubious." Even were dubiety the standard, it would not be met in the face of the present record.

[24]We find no merit in defendants' contention that the order will require the City to hire persons who are not qualified to be firefighters. All will be required to pass physical fitness test, and meet the City's other requirements, other than the written test. As to the written test, its omission cannot be detrimental to the City. The district court found—and defendants do not here dispute—that these exams were not job related. Indeed, the Bridgeport Fire Chief testified that the 1975 exam might well rank lowest those candidates who would be the best firefighters. on the record in this case, therefore, it cannot be said that the minority applicants who failed the firefighters exams are any less qualified than the nonminority individuals who passed.

have been only compensatory[25] — requiring offers only to identifiable victims of past discrimination — and should thus pass muster even with members of this Court who are reluctant to impose quotas or goals. *See, e.g., EEOC* v. *Local 638, supra*, 532 F.2d at 834 (Feinberg, J., concurring) ("Focusing on individuals rather than on groups in granting relief, as by providing an immediate remedy to identifiable plaintiffs who were themselves discriminately denied jobs, can accomplish much without resort to quotas."); *Kirkland* v. *New York State Dep't of Correctional Services, supra*, 520 F.2d at 429 (Van Graafeiland, J., joined by Timbers and Hays, JJ.) ("We must address ourselves to individual rights.").

To the extent that the number of discriminatees who still seek firefighter jobs is less than the number of places on the list, the district court's order requires the City to devise a method for identifying additional minority persons to fill out the list. To this extent the affirmative relief would be more extensive than the compensatory relief and would be directed solely toward alleviating the effects of the City's past discrimination. It is this aspect of the order — *i.e.*, the contingent requirement of a minority offering in excess of the number of identifiable, still interested discriminatees — that must be examined in light of the principles applicable to racial goals. Several factors persuade us that the nature of the court's noncompensatory efforts to eliminate the effects of the past discrimination do not offend Title VII or the Constitution.

Preliminarily we observe that the relief ordered was neither intended to be, nor is it, a quota. In *Rios* v. *Enterprise Ass'n Steamfitters Local 638, supra*, a majority of the panel offered the following distinction between hiring quotas and hiring goals:

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[25] Indeed, in these circumstances the order will have left uncompensated any additional actual victims of the City's discrimination, for as to any excess number the City is not required to offer firefighter positions or pay backpay.

> [While to some the two words may be synonymous, the term "quota" implies a permanence not associated with "goal." For our purposes the significance of the distinction lies in the fact that once a prescribed goal is achieved the Union will not be obligated to maintain it, provided, of course, the Union does not engage in discriminatory conduct.

501 F.2d at 628 n.3. *See also Kirkland* v. *New York State Dep't of Correctional Services, supra*, 520 F.2d at 429-30. With this distinction in mind, Judge Daly stated that he would "impose a hiring goal," and that he "specifically decline[d] to impose a hiring quota." 479 F. Suppl at 114. We agree that the order does not impose a quota. The affirmative requirement as to hiring does not permanently intrude into the City's hiring process. There are 121 vacancies in the fire department. The order requires the City to make its next 102[26] offers to the minority candidates whose names are placed on the list to be compiled. Thereafter no numerical requirements whatever are imposed on the City, either as to the remaining vacancies or future vacancies: the City is required actively to recruit minority candidates to compete for vacancies in the fire department; and it is required to hire on a nondiscriminatory basis; but no permanent numerical requirements are established.

Further, we note that the court's order is properly viewed as setting hiring "goals" because it may well be that not all the 102 minority candidates to be offered positions will actually accept the City's offers.[27] The City has represented that it cannot train new firefighters at a rate faster than 20 every three to six

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[26]Although in Part B, *infra*, we conclude that the number 102 should be reduced, we use it here for convenience.

[27]All of the pertinent provisions of the order require that a list of 102 minority persons be compiled and that those persons be offered positions. See ¶¶ B(1), 2(c), 479 F. Supp. at 115-17. If any of those persons declines the City's offer, there is no requirement that the City find a minority replacement whom it must actually hire.

months. If the list contained as many as 102 names, a period of more than two years could elapse before the last canididates on the list received offers. If as few as 73 names are placed on the list, it appears that at least a year would elapse before the last persons on the list received offers. It is entirely possible that some of the candidates whose names are not near the top of the list will eventually decline to accept appointment to the fire department because of a change in interest or in circumstances during the one to two year interim period. Thus, although the order requires that the next 102 offers be made to minority candidates, it does not mean that minority candidates will be the next 102 persons hired.

Nor does the fact that no nonminority persons will be offered firefighter positions until the City has offered such positions to the persons on the required list mean that the order imposes 100% hiring goals (or, as defendants characterize it, a "100% quota"). The present order must be read in conjunction with the court's interim hiring orders of 1976 and 1977. Those interim orders, which permitted the hiring of 84 firefighters from the 1975 list, expressly provided that those 84 appointments would be counted "as part of" any subsequent court-ordered hiring plan. Thus although the 1979 hiring order is, on its face, limited to minority appointments, 81 nonminority appointments have already been made as part of the hiring plan. As a result of our modification of the size of the offering list, *see Part B, infra*, the court's order will in fact result in minority appointments to fewer than 50% of the firefighter positions filled since 1975.

Moreover, the order does not require the City to achieve a specified racial balance in the fire department; rather the number of minority candidates to whom firefighter positions must be offered is measured against the number of firefighters hired since the first adjudicated discriminatory act. In this respect, the scope of the remedy is more limited than other hiring goals previously approved by this Court (and, indeed, more limited than the initial remedial order in this case — see Part I.C. *supra*). In *Rios* v. *Enterprise Ass'n Steamfitters Local 638,*

supra, and *EEOC* v. *Local 638, supra*, for example, the challenged orders required the defendant unions to achieve certain goals of overall minority membership. In *Vulcan Society of the New York City Fire Dep't* v. *Civil Service Comm'n, supra*, 490 F.2d at 399, this Court approved a hiring ratio that was "midway between what would have been appropriate on the basis of correcting the inequities" of the challenged exam and "the plaintiffs' demands for much more extensive relief." By focusing solely on appointments during the period of proven civil rights violations rather than on overall membership in the fire department, the order here clearly seeks to "correct past discriminatory practices," rather than to "attain racial balance," *United States* v. *Wood, Wire & Metal Lathers Int'l Union, Local 46, supra*, 471 F.2d at 413, thereby avoiding any possible conflict with § 703(j).

Nor do we see that any adverse effects of the establishment of the required offering list will "fall upon 'a small number of readily identifiable' nonminority persons." *ADE* v. *City of Bridgeport, supra*, 594 F.2d at 310, quoting *Kirkland* v. *New York State Dep't of Correctional Services, supra*, 520 F.2d at 429. Those applicants who were hired pursuant to the two interim hiring orders will retain their jobs. Although other nonminority applicants who were placed on the City's appointment list pursuant to the 1975 exam will not be offered positions as early as, or may be passed over in favor of, lower-ranked minority applicants, and possibly in favor of minority persons who did not apply for positions as firefighters, this result will not defeat the nonminority applicants' legitimate expectations. The only source of their expectations was the 1975 exam; and that exam was illegal. And since the mere fact of application to take the exam could not have given rise to any very credible expectation of actual employment, nonminority applicants will not be unduly burdened if some minority nonapplicants are hired pursuant to the court's order.

Finally, the hiring goal is amply supported by the district court's conclusion that "the City of Bridgeport has engaged in a 'clear-cut pattern of long-continued and egregious racial

discrimination' with regard to hiring in the Bridgeport Fire Department." 479 F. Supp. at 112-13. The court based this conclusion, and the conclusion that it was Bridgeport's policy to discriminate against minorities, on specific findings of fact. These included the findings that, in addition to administering discriminatory exams, the City had purposely failed to recruit minority applicans,[28] had actively deterred interested minority applicants, and had discriminated against several individual minority candidates, and that the City's failure to recruit and its discriminatory treatment of minority individuals were not in good faith. The factual predicates for the court's conclusion of longstanding egregious discrimination are well supported by the evidence and are not challenged on this appeal.

In sum, we conclude that the district court's order requiring the City to compile a list of minority persons, giving priority to those who were victims of the City's discrimination, and to offer firefighter positions to those persons before hiring anyone else, was not an abuse of the court's discretion. We turn now to the question of the appropriateness of court's selection of 102 as the number of offerees.

B. The Numerical Scope of the Order

The district court arrived at 102 as the number of persons to be offered firefighter positions, by reference to two factors. First, having found the City in violation of Title VI dating back to January 1, 1971, the court chose the period beginning on that date as the time frame within which to count the nonminority firefighters who had been hired pursuant to the discriminatory

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[28]The deliberate failure to recruit minority applicants is particularly probative of a discriminatory policy where, as here, the minority employment is extremely low. *Cf. International Brotherhood of Teamsters* v. *United States, supra*, 431 U.S. at 365. *See also Grant* v. *Bethlehem Steel Corp.*, 635 F. 2d 1007, 1015 (2d Cir. 1980); *Rogers* v. *Steel Corp.*, 635 F.2d 1007, 1015 (2d Cir. 1980); *Rogers* v. *International Paper Co.*, 510 F.2d 1340, 1345 (8th Cir.), *vacated and remanded mem. on other grounds*, 423 U.S. 809 (1975).

exams. Second, the court ruled that the number of minority persons offered firefighter positions should be approximately 41% of the total number of firefighters hired during the relevant period. We conclude that the time frame must be modified, but that the percentage selected was not an abuse of the court's discretion.

In Part IV above we concluded that the district court's decision must be vacated insofar as it held that the City had violated Title VI. The Title VI violation found by the district court dated back to 1971. The City's violation of the Revenue Sharing Act found by the district court, and not contested here, dates back only to January 1, 1973. The City's violation of Title VII dates back only to March 24, 1972, when Title VII became applicable to the City. Hence, the earliest date on which the City was properly held to have discriminated unlawfully is March 24, 1972, and we conclude that the proper time frame for calculating the required number of minority offerees began in 1972.[29]

The evidence of record reveals that since March 24, 1972, the City has hired a total of 109 nonminority firefighters. Consequently, whatever percentage is appropriate should relate to this figure, not to the 152 nonminority figure that dates back to 1971. If the 41% figure used by the district court is sustainable, the City will be required to offer firefighter positions to 73 minority persons — *i.e.*, the number which, when added to the three minority persons hired within the relevant period, would bring the total minority offerees (76) to approximately 41% of the total (185).

The district court's selection of the 41% figure, however, is somewhat problematical and if the affirmative relief ordered were of a different sort, we might be constrained to request

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[29]This ruling does not mean that relief was improperly extended to persons who were discriminated against in relation to the 1971 exam, since hiring on the basis of the results of that exam extended well into the period for which liability was properly found.

clarification or reconsideration from the district court. Given the actual nature and effect of the order, however, we conclude that the use of this percentage was not an abuse of discretion.

The question arises initialy from the ambiguity of the court's characterization of the 41% figure. The figure was described at the outset of the opinion as the percentage of minorities in the "labor force" in Bridgeport, *see* 479 F. Supp. at 105, and later as the percentage of minority individuals in Bridgeport's "population", *see id.* at 115.[30] *See also* 454 F. Supp. at 757. Plaintiffs argue that the 41% figure does represent the 1975 percentage of minorities in the labor force, and that the City judicially admitted this fact. In fact the City did admit the components of this,[31] and it never asked the district court to relieve

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[30]In the first appeal in this case, our Court referred to the 41% figure as the percentage of minorities in the labor force, *see ADE* v. *City of Bridgeport, supra*, 594 F.2d at 308, but also quoted the district court's statement that minorities constituted 41% of the population, *see id.*

[31]Pursuant to Fed. R. Civ. P. 36, plaintiffs had asked the City to admit the following:

> With respect to the "Affirmative Action Program, City of Bridgeport", published in March, 1976, herein marked Exhibit B:
>
> 14. Exhibit B is a true copy of the Affirmative Action Program prepared by the "Office of contract Compliance" of the city of Bridgeport.
>
> 15. On Page 26 is stated that "all data within this Program is based upon statistics as of October 1975."
>
> 16. On page 98 appears a table entitled "Characteristics of Labor Force Within the City of Bridgeport P >-per."
>
> 17. The figures on the table on page 98 are accurate records of employment statistics by race and sex within the city of Bridgeport proper and are relevant

it of its admission, although on the remand after the first appeal to this Court it attempted to introduce new statistics into evidence; these apparently were intended to show that while the percentage of minority persons in the population was 41%, the percentage of minority persons in the labor force was substantially lower. On this appeal the City contends that the percentage of minority persons in the labor force in 1975 was 23%, a figure that plaintiffs contend is "impossible."[32] Given the nature of the order in the present case, however, we need not reach the question whether the City may or should now be relieved of its judicial admission.

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to further statistical analysis for the purposes of this action.

18. In 1975, black males constituted 13.1% of the Labor Force in the city of Bridgeport proper.

19. In 1975, black females constituted 13.9% of the Labor Force in the city of Bridgeport proper.

20. In 1975, white males constituted 28.3% of the Labor Force in the city of Bridgeport proper.

21. In 1975, white females constituted 30.68% of the Labor Force in the city of Bridgeport proper.

22. In 1975, hispanic males constituted 6.66% of the Labor Force in the city of Bridgeport proper.

23. In 1975, hispanic females constituted 7.34% of the Labor Force in the city of Bridgeport proper.

On the morning the trial was to begin, the City filed a response that, while denying certain statements, *expressly admitted* all of these statements. The court, finding the City's response untimely, struck the entire response, leaving all of the facts set forth in plaintiffs request, including those above, constructively admitted.

[32]Plaintiffs contend that the percentage figures for minorities in the population and the labor force are closely similar.

In cases in which the district court has fashioned a remedy that requires the defendant to achieve a specified percentage of minority representation in its overall membership or among all its employees, we have ruled that "[s]tatistics as to the poplulation of th[e] work force during the pertinent period should provide a more accurate base than total population statistics for determining what would have been the percentage" of minority applicants hired absent the discrimination. *Rios* v. *Enterprise Ass'n Steamfitters Local 638, supra*, 501 F.2d at 632-33. In *Rios*, the district court had ordered the defendant union to admit minority workers in sufficient numbers to achieve a 30% minority membership. Because the provenance of the 30% figure was not clear, and could have represented population rather than labor force, we remand to the district court for explanation or reconsideration. On the other hand, we have more recently envisioned that temporary goals that exceed the minority proportion of the labor force may be justified if the discrimination has been long-standing and effective:

> Any use of a hiring ratio during the interim period to compensate for prior discrimination, that is, a ratio greater than the minority percentage in the applicant pool or the relevant work force, should be imposed only upon clear evidence and appropriate findings of the need to redress demonstrated prior discrimination of long standing that has had a significant impact on minority employment.

Guardians IV, 630 F.2d at 109 (citations omitted); *United States* v. *City of Buffalo*, 633 F.2d 643, 646-47 (2d Cir. 1980) (per curiam).

In the present case, the amply supported findings of long-standing, egregious discrimination, resulting in a fire department with four minority firefighters out of 512, easily meet the constraints of *Guardians IV*. Moreover, the present order differs from that in *Rios* in that it does not establish a goal of 41% minority representation in the fire department. Since the order uses as its frame of reference only the period during which the

City's discrimination is held unlawful, with the percentage being applied only in relation to nonminority hirees in that limited period, minority representation in the fire department will not, on the basis of the order, come anywhere near 41%. The City now has a total of approximately 508 nonminority firefighters (427 in 1975, plus 81 hired pursuant to the interim orders), and 4 minority firefighters. Using the time frame chosen by the district court, the City was to offer positions to 102 minority firefighters. If all 102 accepted, minority firefighters would total 106 out of 614, or 17.3% — far below even the 23% that the City has here contended is the accurate labor force percentage. The effect of our modification of the time frame is to reduce the percentage even lower: with 73 new minority firefighters, minorities would total 77 out of 585, or 13.2%.

Indeed, since the district court's order does not actually require hiring but only offering (*see* note 26, *supra*, and accompanying text), 13.2% is the *maximum* minority representation that would be achieved in the fire department on the basis of the affirmative relief granted by the order. Any declinations by minority offerees would decrease the percentage pro tanto.

In all the circumstances, we find the district court's use of the 41% figure well within the bounds of its discretion. In recognition of our ruling as to Title VI, we simply direct that the order be modified to limit the number of minority persons to whom offers must be made, before anyone else is hired, to 73.[33]

C. Seniority and the Promotional Freeze

The district court's order, in a section entitled "Seniority," prohibits the City "from giving any promotional examinations to firefighters hired from lists generated by the 1971 or 1975 tests until such time as all the [applicants and those who were deterred from applying for the 1971 and 1975 exams] become

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[33]We also therefore modify the number of persons to whom backpay may be awarded, reducing that number to a maximum of 73.

qualified to take the promotional examinations." 479 F. Supp. at 117 (footnote omitted). Appellants claim that the promotional freeze impermissibly violates the rights of currently employed firefighters. On the other hand, plaintiffs contend that the district court did not award enough seniority relief. We reject defendants' contentions but find some merit in those of the plaintiffs.

In *Franks* v. *Bowman Transp. Co., supra*, the Court noted that "[s]eniority systems and the entitlements conferred by credits earned thereunder are of vast and increasing importance in the economic employment system of this Nation" and that, accordingly, if a victim of discrimination is awarded hiring relief only, without seniority, he "will never obtain his rightful place in the hierarchy of seniority according to which these various employment benefits are distributed." 424 U.S. at 766, 768. The Court further stated that the possibility that nonminority expectations will be diminished should not prevent awards of constructive seniority to the victims of discriminiation:

> [I]n exercising their equitable powers, district courts should take as their starting point the presumption in favor of rightful place seniority relief and proceed with further legal analysis from that point; and that such relief may not be denied on the abstract basis of adverse impact upon interests of other employees but rather only on the basis of unusual adverse impact arising from facts and circumstances that would not be generally found in Title VII cases.

424 U.S. at 779 n.41. *See also id.* at 774.

In this case, the court recognized that the wrongful denials of employment to minority individuals in the past would delay their eligibility for promotions. The decision to equalize promotional seniority by delaying the eligibility of those who have already been hired, rather than by ordering instant eligibility for those to be hired, apparently manifests a concern for public safety, and was well within the court's discretion. We note also

that the burden of this provision is not itself discriminatory: it does not fall just on nonminority firefighters, but must be borne also by all four of the minority firefighters presently in the department. Moreover, the court did not bar the City from shortening the time-in-grade requirement for the taking of promotional exams, but rather deferred to the City's expertise in deciding whether of not public safety really requires a three-year time-in-grade period. Thus, it may be within the City's power to lessen the burden for those who are already firefighters. To the extent, however, that the time-in-grade requirements must be maintained in order to ensure public safety, the promotional freeze may well prove to be the only method of insuring access to promotions for past victims of the City's discrimination.

Finally, we note that the delay of promotional eligibility is strictly for the purpose of compensating the victims of the City's discrimination. Although the offeree list may include persons who neither applied to take nor were deterred from taking the 1971 or 1975 exam, the order does not require a delay in promotional eligibility to await the eligibility of such nondiscriminatees.[34]

In addition to the promotional freeze, the district court's backpay order provided compensation for the loss of certain other seniority benefits in the form of the monetary value of salary increments, pension rights, and fringe benefits, *see* 479 F. Supp. at 118-19 (definition of backpay). We conclude, however, as plaintiffs argue, that these provisions may have been inadequate as "make-whole" seniority relief: It seems clear that the district court should have awarded to discriminatees the full measure of constructive seniority. *See generally Franks* v. *Bowman Transp. Co., supra*, 424 U.S. at 763-67. Although plaintiffs have not specified what other privileges of seniority

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[34]Presumably, the City can be expected to offer positions first to those who were the victims of discrimination in order to limit its backpay obligations. This would also have the effect of minimizing the delay in promotional eligibility.

they believe have been denied, it may well be that some have been overlooked. For example, if the City maintains a typical last-hired-first-fired seniority system, constructive seniority with respect to lay-offs would be essential to "make whole" relief under Title VII. *See id.* Moreover, the City's seniority system may afford other benefits, such as increased vacation and sickpay entitlements, that should be awarded to discriminatees in order to give them their "rightful place" in the seniority hierarchy. Because the present record does not fully reveal the workings of the City's seniority system, and because it is not clear how full constructive seniority may best be coordinated with the liquidated seniority benefits already conferred in the backpay section of the district court's order, we remand the matter to the district court so that it may appropriately modify its decree.

D. The Backpay Award

After *Albemarle Paper Co.* v. *Moody, supra*, there can be no doubt that the award of backpay is central to the "make whole" purpose of Title VII:

> [G]iven a finding of unlawful discrimination, backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination. The courts of appeals must maintain a consistent and principled application of the backpay provision, consonant with the twin statutory objectives, while at the same time recognizing that the trial court will often have the keener appreciation of those facts and circumstances peculiar to particular cases.

422 U.S. at 421-22 (footnote omitted). *See also EEOC* v. *Local 638, supra*, 532 F.2d at 832. Having reduced to a maximum of

73 the number of persons who may receive backpay,[35] we note three further respects in which the district court's backpay order requires modification.

First, we find merit in the City's challenge to one of the starting dates for the backpay award. The district court's order provides that persons who were discriminated against with respect to the 1975 exam are entitled to backpay dating back to October 1976, the date on which the City first hired firefighters from the 1975 list. It is clear, however, that not all of the 81 nonminority persons hired pursuant to the 1975 test results were hired in October 1976. Some were hired pursuant to the interim order entered in June 1977. And although the 1976 interim order permitted the immediate hiring of 40, the evidence reveals that only 20 were hired in October 1976, with the remaining hired in 1977. Since "[l]ogically, back pay should be awarded from the date of the unlawful discrimination," Davidson, *"Back Pay" Awards under Title VII of the Civil Rights Act of 1964*, 26 Rutgers L. Rev. 741, 760 (1973), the district court's order should be modified to ensure that the number of minority firefighters to be paid backpay dating back to a given date does not exceed the number of nonminority firefighters hired on that date.

Second, we note that to the extent that the backpay list is not filled with persons to whom firefighters positions must be offered, the names of other actual victims of the City's discrimination may be added. The latter group would include, for example, those who applied for and failed the exams but who are no longer interested in firefighter positions or who do not now meet the City's other requirements. As to this nonofferee group the district court's order does not set a termination date for the backpay obligation. The order should be modified to

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[35]See not 33 *supra*. The number set is a maximum which in fact may not be reached because the district court, properly, awarded backpay only to minority persons who could prove either that they applied to take the 1971 or 1975 exam or that they were deterred from so applying by the City's discriminatory practices.

end the backpay period as of the time the nonofferee ceased or failed to meet any of the City's requirements other than the written exam, or ceased to have interest, whichever is earlier.

Finally, we find merit plaintiffs' contention that, as to certain facts relating to the nonofferees group's entitlement to backpay, the court improperly allocated the burden of proof. The order properly placed on each such person the burden of proving that he applied to take the 1971 or 1975 exam, or that he was deterred from applying by the City's discriminatory policy or practices. However, the order also places on these discriminatees the burden of proving that they met the City's requirements other than passage of the written exam. The latter allocation is contrary to Title VII principles. *See Cohen* v. *West Haven Board of Police Commissioners*, 638 F.2d 496, 502 (2d Cir. 1980). Where there has been an unlawful refusal to hire, individual class members may establish their prima facie entitlement to backpay simply by showing that they applied for the job and were not hired. *Sledge* v. *J. P. Stevens & Co.*, 585 F.2d 625, 637 (4th Cir. 1978), *cert. denied*, 440 U.S. 981 (1979). *See also Rodriguez* v. *Taylor*, 569 F.2d 1231, 1239 (3rd Cir. 1977), *cert. denied*, 436 U.S. 913 (1978); *Swint* v. *Pullman-Standard Co.*, 539 F.2d 77, 103 (5th Cir. 1976); *EEOC* v. *Local 638, supra*, 532 F. 2d at 832-33. *Cf. International Brotherhood of Teamsters* v. United States, supra, 431 U.S. at 361-62. Similarly, where an unlawful policy and practice of discrimination has been proven, one who was thereby deterred from applying for employment may establish his prima facie entitlement to backpay by proving such deterrence. *See id.* at 365-67; *Grant* v. *Bethlehem Steel Corp.*, 635 F. 2d 1007, 1016 (2d Cir. 1980). The burden then shifts to the defendant to rebut this prima facie showing by proving that the class member would not have been hired even absent discrimination — for example, because no vacancies existed or because the claimant failed to meet nondiscriminatory prerequisites for employment. *E.g., Sledge* v. *J. P. Stevens & Co., supra*, 585 F.2d at 637; *Rodriguez* v. *Taylor, supra*, 569 F.2d at 1240; *White* v. *Carolina Paperboard Corp.*, 564 F.2d 1073, 1086 (4th Cir. 1977); *cf. Franks* v. *Bowman Transp. Co., supra*, 424 U.S. at 772-73 & n.32.

With respect to most of the City's prerequisites—*i.e.*, those relating to the candidate's age, residence, education, and possession of a driver's license—we would expect the allocation of the burden of proof to have little impact. However, two prerequisites relate to the physical condition of the candidate in 1971 or 1975, and the order would require that the nonofferee candidate prove that he would have passed the physical agility test and the medical tests that were administered. Proof of prior health or physical conditioning may not be so readily available as would be proof of age, education, etc. If direct proof is unavailable on these questions, it is attributable to the discriminatory policies and practices of the City, which prevented the actual taking of such tests as would have been taken, absent the discrimination. Therefore, to the extent that it is uncertain whether a candidate would have met the City's nondiscriminatory requirements, the uncertainty "should be resolved against the defendant, the party responsible for the lack of certainty." *Cohen* v. *West Haven Board of Police Commissioners, supra*, 638 F.2d at 502; *Stewart* v. *General Motors Corp.*, 542 F.2d 445, 452 (7th Cir. 1976), *cert. denied*, 433 U.S. 919 (1977); *Day* v. *Matthews*, 530 F.2d 1083, 1086 (D.C. Cir. 1976) (per curiam). Paragraphs D(1)(b)(1)-(v) and D(1)(c)(i)-(v) of the district court's order, relating to the burden of proof on these requirements, should be modified accordingly.

VI. CONCLUSION

We affirm the district court's rulings as to liability under Title VII and the Revenue Sharing Act, and vacate the finding of liability under Title VI. We remand for modification of the remedial provisions, in accordance with this opinion, (1) to decrease to 73 the number of minority-persons who must be offered firefighter positions; (2) to decrease to a maximum of 73 the number of minority persons who are awarded backpay; (3) to adjust the starting and ending dates of certain backpay awards; (4) to allow discriminatees to prove their prima facie entitlement to backpay by showing that they applied to take the 1971 or 1975 exam, or were deterred from so applying by the City's discriminatory practices; and (5) to award appropriate con-

structive seniority to individual discriminatees who are hired. In all other respects, we affirm the judgment of the district court.

No costs.

VAN GRAAFEILAND, *Circuit Judge* (concurring)

I wish that I could concur without reservation in Judge Kearse's comprehensive opinion, but I am unable to do so.

In the first place, I believe that the district court erred in not reopening the proof on remand to permit full development of the facts relative to the claim on long-continued and historical discrimination. Without more knowledge of the factual background, I find little support for a finding of long-term discrimination in figures which show that only one black took a test in 1965 and only three blacks took a test in 1968, and none of the four passed. Twenty-two white persons failed to pass these same examinations. On this proof alone, I am not prepared to assume that four failed because they were black and twenty-two failed although they were white.

I am also disturbed about the increased fervor of the attacks upon written civil service examinations. *See Kirkland* v. *New York State Department of Correctional Services*, 520 F.2d 420, 428-29 (2d Cir.), *rehearing en banc denied*, 531 F.2d 5 (2d Cir. 1975), *cert denied*, 429 U.S. 823 (1976). I do not agree that every high school graduate who can pass a physical examination is qualified to become a fire fighter. Assuming, however, that this is so, I am convinced that some high school graduates are better qualified than others. If, five years from now, 1,000 high school graduates pass the physical examination for 100 job openings in the Bridgeport Fire Department, what criteria besides race and sex shall the City use in deciding which ones to hire? Must it revive the discredited spoils system?

I do not believe that a municipality which works with a "respected management firm" to develop, at a cost of

$100,000.00 and 2,745 manhours, a legally satisfactory examination and thereafter uses the examination in good faith is following a policy of discrimination. If the examination is unsatisfactory, the proper course, I submit, is to prepare another one, not to require firemen to trust their lives to colleagues who are thrust upon them by a federal court and whose sole qualifications are the possession of a Connecticut driver's license and an all-too-easily obtainable high school diploma.

Finally, I am concerned about that portion of the majority opinion which orders affirmative relief for others than discriminatees. In 1975 white males comprised only twenty-eight percent of Bridgeport's labor force. Twenty percent were women. Although the judgment herein is limited to blacks and Hispanics, it is quite obvious that women have no greater representation than blacks or Hispanics in the Bridgeport Fire Department. It is not unreasonable, therefore, to anticipate that litigation on behalf of the female members of the "minority" will follow plaintiffs' successful efforts in this case. *See* 42 U.S.C. § 2000e-2(a). I have already expressed my concern that we are headed inexorably to a situation in which the white American male, because of his "majority" status, will be legally precluded from holding more than a minority of jobs in any field. *See Local Union No. 34, IBEW* v. *City of Hartford*, 625 F.2d 416, 425-29 (2d Cir. 1980)(Van Graafeiland, *J.*, dissenting). It appears that this field will in due course include membership in the Bridgeport Fire Department.

Despite the foregoing reservations, I think that racial harmony in Bridgeport will be advanced best by brining this protracted litigation to a close. I therefore concur in the result.

Appendix

Office-Supreme Court, U.S.
FILED
AUG 26 1981
ALEXANDER L. STEVAS,
CLERK

81-374

No.

In The

Supreme Court of the United States

OCTOBER TERM, 1981

THE CITY OF BRIDGEPORT, ET AL
Petitioners-Defendants,

vs.

ASSOCIATION AGAINST DISCRIMINATION IN EMPLOYMENT, INC., ET AL
Respondents-Plaintiffs,

AND

BRIDGEPORT FIREFIGHTERS FOR MERIT EMPLOYMENT, INC., ET AL
Respondents-Intervenor Defendants.

APPENDIX

VOLUME TWO

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VOLUME TWO

APPENDIX B.

Association Against Discrimination in Employment, Inc. v. *City of Bridgeport*, 479 F.Supp. 101 (D.Conn. 1979) 70a

APPENDIX C.

Association Against Discrimination in Employment, Inc. v. *City of Bridgeport*, 594 F.2d 306 (2d Cir. 1979) 104a

APPENDIX D.

Associations Against Discrimination in Employment, Inc. v. *City of Bridgeport*, 454 F.Supp. 751 (D.Conn. 1978) 119a

APPENDIX E.

Association Against Discrimination in Employment, Inc. v. *Weeks*, 454 F.Supp. 758 (D.Conn. 1978) 131a

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

ASSOCIATION AGAINST DISCRIMINATION IN EMPLOYMENT, INC., et al,

Plaintiffs

-vs-

THE CITY OF BRIDGEPORT, et al.

Defendants.

MEMORANDUM OF DECISION

DALY, District Judge

This employment discrimination case is before this Court on remand from the Court of Appeals. *See Association Against Discrimination in Employment* v. *City of Bridgeport,* 594 F.2d 306 (2d Cir. 1979).[1] The named plaintiffs represent the class of all black and hispanic persons who are alleged victims of the City of Bridgeport's allegedly discriminatory employment practices with respect to hiring in the Bridgeport Fire Department. The defendants are the City of Bridgeport and its Civil Service Commission, Board of Fire Commissioners, Fire Chief Engineer, and Mayor. A group of Bridgeport's firefighters, Bridgeport Firefighters for Merit Employment, Inc., has been permitted to intervene, as defendants-intervenors. Subsequent to the remand by the Court of Appeals, the United States was given leave to participate as *amicus curiae.*

Plaintiffs allege that defendants have engaged in a policy and practice of discriminating on the basis or race, color, and/or national origin with respect to entry-level employment in the

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[1]This Court's prior decisions concerning liability and the appropriate remedy are reported at 454 F. Supp. 751 (D. Conn. 1978) and 454 F. Supp. 758 (D. Conn. 1978), respectively.

Bridgeport Fire Department, in violation of Title VII of the Civil Rights Act of 1964, as amended 1972, 42 U.S.C. § 2000e *et seq.* (1970 ed. and Supp. V); Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.* (1970 ed. and Supp. V); and § 122(a) of the Revenue Sharing Act, 31 U.S.C. § 1242(a) (1976 ed.).

LIABILITY

Title VII

I.

The credible evidence in this case establishes that the City of Bridgeport has a long history of and strong reputation for discriminating against black and hispanic persons in its hiring of firefighters. The City has engaged in a continuing pattern and practice of post-Title VII discrimination, that is discrimination

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[2]While the Court's prior decision concerning liability, *see* n. 1, *supra,* dealt primarily with the question whether the 1975 firefighters exam violated Title VII on a disparate impact theory, nothing in that opinion or in the decision of the Court of Appeals limited the scope of the matters otherwise properly before this Court. The EEOC complaints on which this action is founded contain sufficient allegations to place before this Court the issue of whether defendants have violated Titles VI or VII or the Revenue Sharing Act by engaging in a continuing policy and practice of discriminating against black and hispanic persons in entry-level hiring of firefighters. *Cf. Silver* v. *Mahasco Corp.,* No. 78-7595 (2d Cir. July 18, 1979). "A continuously maintained illegal employment policy may be the subject of a valid complaint until a specified number of days after the *last occurrence* of an instance of that policy." *Acha* v. *Beame,* 570 F. 2d 57, 65 (2d Cir. 1978) (emphasis in original). The question of the scope of this case was raised at the outset of trial when defendants' and intervenors' objections to the introduction of evidence relating to matters other than the 1975 test were overruled. (Tr. at 3-6). Since at least that time, all counsel have had explicit notice that the scope of this case extended beyond the question of whether defendants violated Title VII by hiring on the basis of the 1975 test.

occurring since March 24, 1972, against black and hispanic persons by: (1) failing properly to recruit minority applicants, (2) actively deterring minority persons who have sought to become firefighters, and (3) hiring firefighters on the basis of discriminatory qualifying examinations.

The defendants may be held liable under Title VII only for discrimination occurring after March 24, 1972, the date on which the Act became applicable to municipal employers. *Hazelwood School District* v. *United States,* 433 U.S. 299, 309 (1977); *International Brotherhood of Teamsters* v. *United States,* 431 U.S. 324, 356-57 (1977). A history of pre-Act discrimination, however, may be used as a backdrop against which to evaluate post-Act conduct. *Hazelwood School District* v. *United States, supra,* 433 U.S. at 309 n. 15 (1977). "Proof that an employer engaged in racial discrimination prior to the effective date of Title VII might in some circumstances support the inference that such discrimination continued...." *Id.* Moreover, defendants may be held liable if their post-Act conduct unlawfully perpetuates pre-Act discrimination. *Griggs* v. *Duke Power Co.,* 401 U.S. 424, 430 (1971); *United States* v. *N.L. Industries, Inc.,* 479 F.2d 354, 360 (8th Cir. 1973); *United States* v. *Sheet Metal Workers Local 36,* 416 F.2d 123, 139 (8th Cir. 1969); *United States* v. *Central Motor Lines, Inc.,* 338 F. Supp. 532, 558-59 (W.D.N.C. 1971), *appeal on other grounds dismissed sub. nom. EEOC* v. *Central Motor Lines,* 537 F.2d 1162 (4th Cir. 1976).

Statistics showing gross disparities between the percentage of minority persons employed by a defendant and the percentages of minority persons in the relevant labor market have been held to establish *prima facie* proof of discrimination, *Hazelwood School District* v. *United States, supra* at 307-08; *United States* v. *Fresno Unified School District,* 592 F.2d 1088, 1096 n.5 (9th Cir. 1979); *United States* v. *Ironworkers Local 86,* 443 F.2d 544, 551 & n. 21 (9th Cir.), *cert. denied* 404 U.S. 984 (1971), particularly where supported by evidence of individual instances of discrimination. *International Brotherhood of Teamsters* v. *United States, supra* at 339. "Statistics showing

racial or ethnic imbalance are probative...because such imbalance is often a telltale sign of purposeful discrimination...." *Id.* at 339-40 n. 20, 97 S.Ct. at 1856 n. 20.

II.

The statistics in this case speak for themselves. Between 1965 and March 24, 1972, the City hired 85 firefighters, 84 of whom were white. Later in 1972, the City hired an additional 28 firefighters, all of whom were white. In 1975, when black and hispanic persons comprised approximately 41% of Bridgeport's labor force, its Fire Department had 427 whites, one hispanic, and no blacks.[3] In its entire history prior to 1975, the City had employed only two minority firefighters, one of whom had been hired in 1938. Since 1975, the City has hired an additional 84 firefighters, 81 of whom have been white.[4] As the Court of

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[3]The City has a one-year residency requirement for firefighter applicants, and is itself, therefore, the relevant labor market. *See EEOC* v. *Local 14, International Union of Operating Engineers,* 553 F. 2d 251, 254 (2d Cir. 1977).

[4]The 84 firefighters hired since 1975 were hired pursuant to a court-approved agreement among the parties. The parties agreed, in relevant part,

> that the defendants may make at any time appointments to the Bridgeport Fire Department of a number of firefighters equal to one-half the number for which the city warrants there is and will remain an immediate need and adequate funding. In the event the Court should order a hiring plan, these appointments will be counted as part of such plan.

The Court of Appeals suggested that this Court should "explicitly consider all the implications of" the hiring agreement. 594 F. 2d at 312. The implications of the agreement seem clear. Plaintiffs agreed not to seek to enjoin defendants from hiring firefighters from the 1975 list, provided that defendants warranted that there was and would remain an immediate need and adequate funding for a number of firefighters equal to the number actually hired pursuant to the agreement.

Appeals noted with respect to the composition of the Fire Department in 1975, "[n]o manner of legal argument can justify th[ese] unpleasant fact[s]." 594 F.2d at 308.

The statistics in this case, while alone presenting compelling evidence of discrimination by the City, are not the only evidence of such discrimination. The evidence also establishes that in light of its reputation as a discriminatory employer the City has failed properly to recruit minority applicants for the Fire Department and has discriminated against minority individuals who have sought to apply for positions with the Fire Department.

Not surprisingly, the City's reputation as an employer has corresponded to the statistics above. By 1972, the City had established a reputation for employment discrimination against black and hispanic persons that was "by far the worst" of all cities in Connecticut. (Tr. at 733)[5] (testimony of Arthur Green, Connecticut Commission on Human Rights & Opportunities). This reputation created the attitude in the black community that "[i]f you're black, just don't apply because you won't get the job." (Tr. at 1963) (testimony of J. Michael Smith, District Director of Association for Bridgeport Community Development). In keeping with this reputation, the City never has made any significant efforts to remedy its situation by recruiting

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There is nothing to indicate that defendants agreed to quota relief, or that plaintiffs agreed that defendants would not be liable for back pay. This Court sees no reason to conclude either that the judicial approval of the hiring agreement operated to absolve defendants of any liability, or that defendants conceded by entering into the agreement that quota or any other type of relief would be appropriate.

[5]Unless other dates are noted specifically, the transcript referred to (Tr.) is that of the trial on liability, spanning dates from October 28, 1977 to December 1, 1977.

minority applicants for positions in the Fire Department.[6] Absolutely no attempts were made to recruit minority applicants for qualifying examinations prior to 1972. Despite the testimony of John Colligan, Personnel Assistant for the City of Bridgeport, that the City had a "very extensive recruitment program" of minority applicants for the 1975 exam (Tr. at 865), the credible evidence established that the City's recruitment efforts for that exam did not approach the dimensions of the "multi-media" campaign described by Colligan. (*Id.*)[7]

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[6]The gross disparity between the minority percentage of the City's population and the minority percentage of the applicants for the firefighters tests in question supports the inference that defendant have unlawfully deterred minority persons from filing applications. Only 14.3% of the applicants who sat for the 1975 exam, for instance, were minority persons, compared to the 41% minority representation in the City's population. The disparity with regard to earlier examinations is even more dramatic. *See* n. 9, *infra.*

[7]John Colligan, Personnel Assistant for the City of Bridgeport, testified that with regard to the 1975 exam, "[w]e had a very extensive recruitment program for the position of firefighter in the City of Bridgeport.... [I]t was what you would call a multi-media campaign." (Tr. at 865). He stated that newspaper ads were placed in the Bridgeport Post and Telegram and in "the local minority newspaper, the Harumbie Union...," *Id.*, and that radio ads were placed on minority-oriented programs on stations WICC, WNAB, and WLVH. He also indicated that the City "worked with virtually every minority community leader that we had contact with," (Tr. at 866), and "also had the assistance of the Bridgeport Guardian Association, which is a fraternal organization of black police officers, and they assisted us ably in the recruitment." *Id.* When asked specifically "who in the Bridgeport Guardian assisted you," Colligan stated that "Ted Meekins and Alerise Best both came to the Civil Service Office on several occasions and picked up applications," (Tr. at 954). When asked whether anyone else from the Guardians assisted, Colligan stated "[t]o my knowledge it was Ted Meekins and Alerise Best." *Id.*

The credible evidence established, however, that the City's recruitment efforts did not approach the dimensions of the "multi-media" campaign described by Colligan. William Abbott, Managing Director

The only significant minority recruitment effort for the 1975 test was undertaken not by the City but by a coalition of community minority groups coordinated by Thomas Thompson, Director of the United States Labor Department Recruitment and Training Program in Bridgeport. The coalition was formed in 1973 "to try and establish some type of vehicle to assist minorities in gaining access to civil service jobs, particularly in the police and fire department." (Tr. at 46). When the coalition learned the 1975 exam would be given, its members "did on-the-street recruitment, both on the east end, west end, south end, all parts of town, by stopping individuals in pool rooms, bars, individuals walking down the street and asking them were they interested in taking the examination." (Tr. at 54). The coalition held community meetings to inform the minority community of the opportunity to take the firefighters test. Most significantly, the coalition held training sessions and provided instructors to prepare applicants for the test. These sessions were open to anyone, regardless of race, and were held three or four nights a week for three hours each night. Individual applicants attended these sessions for one to two months prior to the exam.

The City was fully aware of the coalition's recruitment efforts, but did little to assist the coalition and, in fact, partially impeded its effort. After the coalition had been formed, Thompson approached the then-Mayor, requesting that the City take action to recruit minority firefighters and offering the coalition's assistance in that effort. The Mayor apparently was

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of WNAB Broadcast Center in Bridgeport, stated that no "paid" ad had been placed on the station for the 1975 test and that he was "almost...certain" that no "Public Service spots" had been used. (Tr. at 1950-51). Jose Grimald, President of WLVH in Hartford, testified that his station had no records of any advertising by the City of Bridgeport for the 1975 firefighters exam. Both Alerise Best and Theophilus (Ted) Meekins testified that they never had been asked to and never had participated in any way in recruitment for the 1975 firefighters exam. This evidence effectively destroyed any potential probative value of Colligan's testimony concerning an "extensive," "multi-media" recruitment effort by the City of Bridgeport.

receptive to this suggestion, and members of the coalition subsequently met with the City's Civil Service Personnel Director and representatives from the Fire Department. Ultimately, however, the City assisted the coalition in only two ways. First, the Civil Service Commission altered its apparently long-standing policy of requiring applicants to submit applications in person at the Commission's offices in City Hall, and permitted the coalition to accept applications at the offices of the Association for Bridgeport Community Development (ABCD).[8] As will be discussed later, however, some problems developed relating to the processing of these applications. Second, the Personnel Director, Alan Cohen, provided the coalition with a "notice of examination" that outlined in a general way the subjects to be covered by the test. The notice contained the following language:

> Further, candidates must possess the following: mental alertness, mechanical aptitude, aptitude for increasing knowledge of the trade and for learning the variety of work performed by Fire Fighters; good knowledge of first aid and a working knowledge of the geography of the City of Bridgeport; ability to read and write understandingly [sic] the English language.

Based on Cohen's statement that the subjects mentioned in the notice would be covered on the test and that the coalition could use the notice as a guide to what would be on the test, the coalition focused its training program on these subjects. The coalition obtained a selection of tools used by firefighters and trained applicants in their use. Applicants were provided with maps of Bridgeport so that they could become familiar with its geography, and a first aid course was given.

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[8]Throughout the time period discussed in this opinion, the staff at the Civil Service Commission Office has been all white. By failing to employ minority persons in this office, the City, in effect, has placed "a sign reading 'Whites Only' on the hiring office door,..." *International Brotherhood of Teamsters* v. *United States,* 431 U.S. 324, 365 (1977).

The questions on the 1975 test, however, bore no resemblance to the questions anticipated by those who had gone through the coalition training program. There were no questions involving geography, first aid, or the use of firefighting equipment. Those who had been through the training program were thus potentially at a disadvantage, having been led to believe that they would be taking a test vastly different from the one placed before them. These applicants were disappointed and felt that "[t]he City has fooled us again." (Tr. at 161). Needless to say, the ultimate results of the 1975 test served only to strengthen the City's reputation as a discriminatory employer.

With the exception of these two rather ineffective and perhaps detrimental efforts to assist the coalition, the City did nothing to assist, endorse, publicize or otherwise associate itself with the coalition's recruitment effort.

The credible evidence also establishes that there were several instances of individual discrimination against minority applicants at the time of the 1975 test. Elias Castro is an hispanic person who has had four years' experience as a firefighter in the United States Air Force. Through an arrangement, mentioned earlier, between the Bridgeport Civil Service Commission and Thomas Thompson, Director of the United States Department of Labor Recruitment and Training Program for Bridgeport, Castro was allowed to and did file his application to become a firefighter at the offices of the Association for Bridgeport Community Development (ABCD). (The Civil Service Commission, prior to the 1975 exam, had required that all applications be filed at its office in City Hall.) Castro expected that his application would be forwarded by ABCD to the Civil Service Commission. On the last day for filing applications, Castro was informed that the Civil Service Commission did not have his application. He immediately went to the Civil Service Commission Office and attempted to file another application. Although it was still mid-afternoon on the last day for filing applications, Castro was told that it was "too late" for him to file another application. Castro unsuccessfully sought to speak to the superior of the person who had told him he could not file an

application. Castro was not informed of any means by which he could appeal or officially complain of the refusal to accept his application. He did not take the 1975 firefighters exam.

Harmen Linares is an hispanic individual who filled out a timely application for the 1975 exam at the Civil Service Commission Office. He was told that he would receive notice notice in the mail of the date and time of the examination. Linares never received any notice, and later learned that he had missed the examination.

Ismael Pomales is an hispanic individual who took the 1975 examination and passed it but did not receive any notification that he had passed until he was informed by registered mail that his name was being removed from the list because he had not appeared for his scheduled physical agility examination. The registered letter he received did not indicate that he could take any steps to appeal the Commission's action in removing his name from the list.

Defendants also have discriminated against black and hispanic persons by using discriminatory firefighters qualifying tests. All of the firefighters qualifying examinations given by the City since 1965 have been discriminatory in that they have had a disparate impact on minorities and have not been job related. The City has admitted that all firefighters qualifying examinations given between 1965 and 1972 had a disparate impact on minorities and were not job related, and the evidence in the case supports this admission.[9] This Court found in its

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[9] Firefighters qualifying examinations were administered by the City in 1965, 1968, and 1971. The following table illustrates the racial composition of the applicant groups for each test:

Year	Total Applicants	White	Black	Hispanic	Unknown
1965	32	26	1	1	4
1968	75	59	3	1	12
1971	277	225	13	2	37

previous opinion that the 1975 examination, the only one that has been administered since 1972, had a disparate impact on minorities and was not job related, *see Association Against Discrimination in Employment* v. *City of Bridgeport,* 454 F.Supp. 754, 758 (D. Conn. 1978), and those findings are hereby reaffirmed and incorporated by reference herein. The Court now also finds that the disparate impact of the 1975 exam would not

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The following table illustrates the composite pass rate, by race, for all three tests combined:

Race	All	White	Black	Hispanic	Unknown
# of Applicants	384	310	17	4	53
# Passing	113	112	0	1	0
% Passing	29.4%	36.2%	0%	25%	0%

If the figures for black and hispanic applicants are combined, the composite passing percentage (1/21) is 4.8%. If the assumption is made that all unknown applicants were white (this assumption tends to minimize disparate impact in this situation because all unknown applicants failed), the composite white passing rate (112/363) is reduced but only to 30.9%, a percentage still far exceeding the minority pass rate figure. These statistics appear to present a sample size large enough to be probative of discrimination, *United States* v. *San Diego County,* Civil No. 76-1094-S, Memorandum of Decision at 15 (S.D.Cal. July 6, 1979), particularly where the number of minority persons hired approaches "the inexorable zero." *See International Brotherhood of Teamsters* v. *United States,* 431 U.S. 324, 342 n. 23 (1977).

No effort ever had been made by the City to validate a firefighters test before the 1975 test. The pre-1975 tests were of a type held to be discriminatory in *Bridgeport Guardians, Inc.* v. *Bridgeport Civil Service Commission,* 482 F.2d 1333 (2d Cir. 1973), *on remand.* Civil No. B-457 (D.Conn. Oct. 3, 1973), *aff'd* 497 F.2d 1113 (2d Cir. 1974), *cert. denied* 421 U.S. 991 (1975).

have been eliminated simply by reducing the passing score to 6.[10]

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[10]The Court of Appeals suggested in its decision that this Court consider on remand defendants' claim that lowering the passing score of the 1975 exam to 6 would eliminate disparate impact and thereby absolve defendants from liability in this case. The Court of Appeals wrote:

> ...We have found no authority on whether an employer who selects a cut-off score and defends it until the test has been found not job-related can then avoid the implications of that finding by adjusting the passing score to a point where the disparate impact is arguably insignificant.

594 F.2d at 313 n.20. This Court finds that this intriguing issue is not before it because, first, simply lowering the passing score of the 1975 exam to 6 would not eliminate the exam's disparate impact, and, second, this Court now finds that defendants have engaged in a policy and practice of discrimination extending well beyond the 1975 exam.

A total of 771 individuals took the 1975 exam. All applicants now have been racially identified. The following table illustrates the passing rates of whites and minority persons at scores of 12 and 6.

PASSING SCORE OF 12

	Total Tested	Passed	Failed	% Passing
White	661	184	477	27.8
Minority	110	8	102	7.3

PASSING SCORE OF 6

White	661	448	213	67.8
Minority	110	59	51	53.6

A lowering of the passing score to 6, then, would reduce the disparity between white and minority pass rates from 20.5 percentage points to 14.2. Dr. John Peck, plaintiffs' expert, testified, however, that a difference of 14.2 would remain very highly significant. He calculated that the likelihood of this difference being attributable to chance

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would be less than five chances in one thousand. Dr. Alan Gelfand, intervenors' expert, also testified that simply lowering the score to 6 would not eliminate disparate impact.

Even if lowering the score to 6 would eliminate disparate impact with respect to the absolute numbers of whites and minority persons passing, the disparate impact in terms of ranking would not be eliminated simply by lowering the score. The top 84 candidates on the list would have been hired, and 81 of them are white. The list would have a disparate impact on minority persons because whites would tend to be hired first. In fact, because 507 applicants scored 6 or higher on the test, and the Fire Department currently has only 121 vacancies, those who passed the test but who are on the lower end of the list probably would not be hired at all even if the passing score were reduced. (This remains true if the 84 who have been hired are taken into account; 423 applicants would remain to compete for 121 positions.) *See Vulcan Society* v. *Civil Service Commission,* 490 F.2d 387, 392 (2d Cir. 1973). Simply lowering the score to 6, then would not eliminate disparate impact.

Defendants and Intervenors have suggested that the Court should order some hiring plan that involves a lowering of the passing score to 6 and an elimination of the ranking system. They suggest the establishment of two pools of passing candidates, one white pool and one minority pool, from which candidates could be chosen at random pursuant to a formula that would ensure that the percentage of minority persons hired from the passing list would equal the percentage of minority persons who sat for the exam, thus eliminating disparate impact with respect to both absolute numbers and ranking. The result of such a Court-ordered plan, it is argued, would be a finding that defendants are not liable for discrimination with respect to the 1975 exam. In view of its finding that the City has engaged in a continuing policy and practice of discriminating against black and hispanic persons, this Court perceives no need to address this novel contention. *See EEOC* v. *Local 638,* 532 F.2d 821, 826 (2d Cir. 1976).

The Court would note, however, that one serious problem with the approach suggested by defendants and defendants-intervenors is that it would involve Court-ordered hiring on the basis of an exam that is not job related. The Court, in its previous opinion, found serious

III.

Defendants have violated Title VII by failing properly to recruit minority applicants, thus perpetuating the deterrent effect of pre-Act discrimination. *Rogers* v. *International Paper Co.*, 510 F.2d 1340, 1345 (8th Cir.), *vacated* and *remanded on other grounds* 423 U.S. 809, *modified* 526 F.2d 722 (8th Cir. 1975); *United States* v. *Sheet Metal Workers Local 36, supra,* 416 F.2d at 137-40; *United States* v. *Central Motor Lines, Inc., supra,* 338 F.Supp. at 558. *See Bridgeport Guardians* v. *Members of Bridgeport Civil Service Commission,* 482 F.2d 1333, 1340 (2d Cir.), *on remand on other grounds* Civil No. B-457 (D. Conn. Oct. 3, 1973), *aff'd* 497 F.2d 1113 (2d Cir. 1974), *cert. denied* 421 U.S. 991 (1975). Primary reliance on word-of-mouth recruitment is unlawful under the circumstances present here.

deficiencies in the method of preparation and validation of the 1975 exam. The Court now also notes that in reaching its conclusion that there was a correlation between how well a firefighter performed on the 1975 test battery and how well that firefighter was rated by his superiors, Hay Associates used "out-of-range" and "blank" data. "Out-of-range" data are data indicating that an individual has received a score outside of the possible range of scores. Such data may be the result of clerical error. "Blank" data are data indicating that no score at all was received by certain individuals, perhaps indicating that those individuals had not taken the test in question. The computer used by Hay interpreted these "blanks" as zeros. The use of these data in this case seriously altered the results of Hay's correlation calculations. Plaintiffs' expert, Dr. Peck, testified that if adjustments were made to compensate for this misuse of data, there would be no significant correlation between job performance and performance on the 1975 test, (Tr. at 2205). Hay's own validation data then, showed that "as far as test passing is concerned, it would be about as good a predictor [of job performance] as tossing a coin...." (Tr. at 2219) (testimony of Dr. John Peck). Moreover, if adjustments are made for the misuse of "blank" scores, Hay's own validation data reveal that the FIT Mechanics test was significantly discriminatory against blacks. (Tr. at 2247-53). Dr. Peck testified that "someone who had followed appropriate statistical methodology and wished to eliminate tests with a disparate impact..." would not have used the FIT Mechanics test as part of the 1975 firefighters test. (Tr. at 2256).

United States v. *Georgia Power Co.*, 474 F.2d 906, 925-26 (5th Cir. 1973). *See also Franks* v. *Bowman Transportation Co.*, 495 F.2d 398, 418-19 (5th Cir. 1974), *reversed on other grounds*, 424 U.S. 747 (1976); *Stamps* v. *Detroit Edison Co.*, 365 F.Supp. 87, 117 (E.D. Mich. 1973), *aff'd in relevant part* 515 F.2d 301 (6th Cir. 1975), *vacated and remanded on other grounds* 431 U.S. 951 (1977).

Defendants also have violated Title VII by engaging in isolated acts of discrimination against individual applicants for firefighters' positions. *See International Brotherhood of Teamsters* v. *United States, supra*, 431 U.S. at 338 n. 19, 97 S.Ct. 1843.

Finally, defendants have violated Title VII by hiring firefighters since March 24, 1972 from lists generated by examinations that had disparate impacts on black and hispanic persons and were not job related. *See Dothard* v. *Rawlinson*, 433 U.S. 321, 329 (1977) 97 S.Ct. 2720, 531 L.Ed.2d 786 (1977). Twenty-eight firefighters were hired in 1972 from a list generated by a 1971 exam. This post-Act hiring of firefighters violated Title VII even though the 1971 exam was administered before the Act became applicable to the City. *Guardians Association of the New York City Police Department, Inc.* v. *Civil Service Commission*, 466 F. Supp. 1273, 1277 (S.D.N.Y. 1979). An additional 84 firefighters were hired as a result of a 1975 exam that this Court has found to have been discriminatory. 454 F.Supp. at 758. Of the 112 firefighters hired since March 24, 1972, 109 have been white, while three have been black or hispanic.

In summary, this Court finds that since March 24, 1972, defendants have violated Title VII by engaging in a policy and practice of discrimination against black and hispanic persons relative to entry-level hiring in the Bridgeport Fire Department.

Title VI

Title VI, which became effective July 2, 1964, prohibits discrimination in "any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d (1970 ed. and Supp. V).

It is now clear that a private right of action exists under Title VI, *Cannon* v. *University of Chicago,* 441 U.S. 677, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979), and that the remedies that are available under Title VII also are available under Title VI. *Guardians Association of the New York City Police Department, Inc.* v. *Civil Service Commission of the City of New York, supra* at 1280-87.

Defendants, in their answer, have admitted that federal funds have been received by the City and expended in the Fire Department. Plaintiffs have proven that such funds were received and expended in the Fire Department in each year between 1971 and 1977.

In 1971, the City administered a firefighters qualifying examination that had a disparate impact on black and hispanic applicants and that was not job related. The City made no efforts to recruit minority applicants for this test. In 1970, Thomas Thompson spoke to the then-Mayor[11] about the lack of minority firefighters in Bridgeport. Thompson suggested the establishment of an office of affirmative action to deal with minority hiring in the City, particularly in the Fire Department. Thompson explained that he was the director of a federal recruitment program and would be willing to undertake efforts to recruit minority applicants. Not only was Thompson never asked to help recruit for the 1971 exam, he was never informed that the test would be given. He learned of it only after it had been administered. Of the 72 people who passed the exam, 71 were white. All 72 were hired during 1971 and 1972.

In view of the City's long history of and reputation for discrimination against minorities with respect to employment in its Fire Department, its failure actively to recruit minorities for the 1971 test violated Title VI. *See Rogers* v. *International Paper Co., supra.* The City's failure to inform Thompson of its plans

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[11]The Mayor referred to here is not the same Mayor referred to in the text at p. 107, *supra.*

to administer the 1971 test is evidence that its failure to recruit minority applicants was purposeful. The test itself, as stated above, was discriminatory. For all of these reasons, and for the reasons stated earlier with respect to Title VII, this Court finds that since 1971, defendants have engaged in a continuing course of conduct in violation of Title VI by engaging in a policy and practice of discriminating against black and hispanic persons with regard to entry-level employment in the Bridgeport Fire Department.

The Revenue Sharing Act

The Revenue Sharing Act prohibits discrimination in programs and activities receiving revenue sharing funds. 31 U.S.C. § 1242(a) (1976 ed.). The Act expressly provides for private civil actions. 21 U.S.C. § 1244(a). *See also United States* v. *City of Chicago,* 395 F.Supp. 329, 342 n. 5 (N.D.Ill.), *aff'd* 525 F.2d 695 (7th Cir. 1975). Plaintiffs here appropriately have exhausted administrative remedies. *See* 31 U.S.C. § 1244(d) (2). The City of Bridgeport has received revenue sharing funds in each year beginning with 1973 and has expended a portion of them in the operation of its Fire Department. (Tr. at 784-786) (testimony of then-Controller John Norko). For the reasons stated with respect to Titles VI and VII, above, this Court finds that defendants, since January 1, 1973, have violated the Revenue Sharing Act by engaging in a policy and practice of discriminating against black and hispanic persons in regard to entry-level hiring in the Bridgeport Fire Department.

Summary

In summary, the Court finds that defendants, by engaging in a continuing policy and practice of discriminating against blacks and hispanic persons in regard to entry-level hiring in the Bridgeport Fire Department, have violated Title VI since January 1, 1971, Title VII since March 24, 1972, and the Revenue Sharing Act since January 1, 1973.

REMEDY

Titles VI & VII

I.

"Once a violation of Title VII is established, the district court possesses broad power as a court of equity to remedy the vestiges of past discriminatory practice," *Rios* v. *Enterprise Association Steamfitters Local 638,* 501 F.2d 622, 629 (2d Cir. 1974), and "to grant affirmative relief to combat the invidious and often subtle practices of discrimination." *United States* v. *Wood, Wire & Metal Lathers International Union, Local 46,* 471 F.2d 408, 413 (2d Cir.) *cert. denied,* 412 U.S. 939, 93 S.Ct. 2773, 37 L.Ed.2d 398 (1973). The purpose of the grant of broad remedial discretion is to permit the district court to fashion "the most complete relief possible" to "make whole" those who have been victims of unlawful discriminatory practices. *Albermarle Paper Co.* v. *Moody,* 422 U.S. 405, 421, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975). While recognizing that "any attempt to reconstruct what would have happened in the absence of discrimination is fraught with considerable difficulty," *Rios* v. *Enterprise Association Steamfitters Local 638, supra,* 501 F.2d at 632, and that "no remedy is perfect," *Kirkland* v. *New York State Department of Correctional Services,* 531 F.2d 5, 10 (2d Cir. 1975) (Mansfield, J., dissenting), *cert. denied* 429 U.S. 823, 97 S.Ct. 73, 50 L.Ed.2d 84 (1976), *rehearing denied* 429 U.S. 1124, 97 S.Ct. 1162, 51 L.Ed.2d 574 (1977), the district court should make its best attempt to fashion a "fair measure of redress" for those who have been discriminated against "at no undue expense" to others. *Chance* v. *Board of Bar Examiners,* 534 F.2d 993, 1003 (2d Cir. 1976) (Oakes, J., dissenting), *cert. denied* 431 U.S. 965, 97 S.Ct. 2920, 53 L.Ed.2d 1060 *rehearing denied* 434 U.S. 881, 98 S.Ct. 243, 54 L.Ed.2d 164 (1977). The federal courts have "not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Albermarle Paper Co.* v. *Moody, supra,* 422 U.S. at 418, *quoting Louisiana* v. *United States,* 380 U.S. 145, 154, 85 S.Ct. 817, 13 L.Ed.2d 709 (1965).

As noted earlier, the remedies available for Title VI violations are the same as those available for Title VII violations. *Guardians Association of the New York City Police Department, Inc.* v. *Civil Service Commission of the City of New York, supra.* Defendants have violated Title VI since January 1, 1971 and Title VII since March 24, 1972. The Court's power under Titles VI or VII thus is limited to remedying discrimination that occurred after January 1, 1971. *Hazelwood School District* v. *United States, supra,* 433 U.S. at 309, n. 15, 97 S.Ct. 2736.

While aware that the imposition of race-conscious hiring orders should be approached in a "gingerly fashion," *Kirkland* v. *New York State Department of Correctional Services,* 520 F.2d 420, 427 (2d Cir.), *rehearing en banc denied* 531 F.2d 5 (2d Cir. 1975), *cert. denied* 429 U.S. 823, 97 S.Ct. 73, 50 L.Ed.2d 84 (1976), *rehearing denied* 429 U.S. 1124, 97 S.Ct. 1162, 51 L.Ed.2d 574 (1977), and utilized only if necessary to redress "a clear-cut pattern of long-continued and egregious racial discrimination," *Association Against Discrimination in Employment* v. *City of Bridgeport, supra,* 594 F.2d at 310, *quoting Kirkland* v. *New York State Department of Correctional Services, supra,* 520 F.2d at 427, this Court concludes that it would be "shirking its duty to fashion an effective remedy were it not to order such relief here." *United States* v. *San Diego County,* Civil No. 76-1094-S. Memo. of Decision at 18 (S.D.Cal. July 6, 1979); *cf. Albermarle Paper Co.* v. *Moody, supra.* It is clear that the City of Bridgeport has engaged in a "clearcut pattern of long-continued and egregious racial discrimination" with regard to hiring in the Bridgeport Fire Department. This fact is apparent from a cursory examination of the statistical evidence in this case. Two-fifths of the residents of the City are minority persons, but the minority representation on the Fire Department approaches the "inexorable zero." *International Brotherhood of Teamsters* v. *United States, supra,* 431 U.S. at 342 n. 23, 97 S.Ct. 1843.

Other factors support the conclusion that the discrimination has been "egregious." These include the City's refusal actively to recruit minority persons, its failure to inform Thomas Thompson that the 1971 firefighters exam was to be given, its

failure to comply with its own affirmative action plan,[12] its maintenance of an all-white Department of Civil Service throughout the period discussed in this opinion,[13] and its individual instances of discrimination against minority persons who actively sought to become firefighters. This Court also finds that the discrimination has been "long-continued" whether one examines the entire history of the City's hiring of firefighters or only its post-Act conduct.

A hiring order is particularly appropriate here because the City is a public employer and the Fire Department is a highly

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[12]In 1973, after the original decision in *Bridgeport Guardians* v. *Bridgeport Civil Service Commission, supra,* involving Bridgeport's Police Department, the City drafted an Affirmative Action Plan. The draft indicated that

> problems have resulted from the City's failure to modify its existing employment practices, which are extremely inflexible and insensitive to employment issues concerning protected classes. To date, the City has failed to take any aggressive action to comply with Equal Employment Opportunity Legislation.

(Ex. 55, p. 102). The Plan was not adopted until several years later when the City was forced to adopt an acceptable Plan or forego receipt of approximately $7 million in federal funds. (Tr. at 647, 1966). The statements in this Affirmative Action Plan indicate that for some time the City has been aware of its own discriminatory policies and reputation. The Plan itself indicates that in order to achieve reasonable minority representation among its "Public Safety" employees (a designation apparently encompassing almost exclusively firefighters), the City for three years should hire only black and hispanic persons for such positions. (Ex. 2, p. 111). Fewer minority persons will be hired pursuant to this Order (102) than the Affirmative Action Plan indicates should be hired in the "Public Safety" area (141). No voluntary efforts have been made by the City to comply with its own affirmative action goals for the Fire Department.

[13]*See* n. 8, *supra.*

visible municipal uniformed service. *Bridgeport Guardians Inc.* v. *Members of Bridgeport Civil Service Commission, supra,* 482 F.2d at 1341. At the remedy hearing before this Court on July 20, 1978, counsel for the City acknowledged that

> it is in the city's interest to have its minority citizens represented on its fire and police departments and every other department of the city,.... We — the city would accept gladly and willingly some adequate remedy that this Court might devise to make sure our minorities are — qualified minority citizens are on that department, and that would help us in reaching some of our affirmative action goals which in our competitive field we're handcuffed.

(Tr. at 100). Moreover, this Court is of the opinion that merely ordering nondiscriminatory hiring in the future, even coupled with the requirement that the City actively recruit minority candidates, would be inadequate either to remedy past discrimination or "to assure prospective minority candidates that applying is no longer futile." *Association Against Discrimination in Employment* v. *City of Bridgeport, supra,* 594 F.2d at 311 n. 13. "The effects of...past violation[s] of minority's rights cannot be eliminated merely by prohibiting future discrimination, since this would be illusory and inadequate as a remedy. Affirmative action is essential." *Rios* v. *Enterprise Association Steamfitters Local 638, supra,* 501 F.2d at 631.[14]

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[14]In its prior opinion, this Court indicated that "there appears to be no bad faith on the part of defendants in using the exam or selecting the respected management consulting firm of Hay to develop the exam." 454 F.Supp. at 757. Defendants and defendants-Intervenors now argue that the imposition of a hiring order would be inconsistent with this prior finding of good faith. Good faith, however, is not a defense to a charge of discrimination based on the use of discriminatory tests. *Griggs* v. *Duke Power Co.,* 401 U.S. 424, 432 (1971). And while good faith may be a factor to be considered in fashioning a remedy, the prior finding of good faith did not apply to defendants' lack of recruitment of minority applicants or treatment of individual minority persons.

A hiring order should not be imposed if the reverse discriminatory effects of such an order "fall upon 'a small number of readily identifiable' non-minority persons." *Association Against Discrimination in Employment* v. *City of Bridgeport, supra,* 594 F.2d at 310, *quoting Kirkland* v. *New York State Department of Correctional Services, supra,* 520 F.2d at 429. In fashioning its hiring order, then, this Court begins with the proposition that none of the firefighters presently on the force should be "bumped" in order to make room for minority firefighters. *EEOC* v. *Local 628,* 532 F.2d 821, 830 (2d Cir. 1976), *on remand* No. 71 Civ. 2877 (S.D.N.Y. Jan. 19, 1977), *aff'd* 565 F.2d 31 (2d Cir. 1977). An order mandating the entry-level hiring of a specified number or ratio of minority persons, however, is a permissible means of remedying past discrimination because it is not possible readily to identify those non-minority persons who are being "kept out" by virtue of the order. *Cf. Patterson* v. *Newspaper & Mail Deliverers' Union,* 514 F.2d 767, 773-75 (2d Cir. 1975), *cert. denied* 427 U.S. 911, 96 S.Ct. 3198, 49 L.Ed.2d 1203 (1976). "[A]n entry-level quota has a more diffuse and amorphous effect upon reverse discriminatees than a quota used to bump incumbents or hinder promotion of present numbers of the work force." *Id.* This Court, having made an explicit finding of past discrimination, *cf. Regents of University of California* v. *Bakke,* 438 U.S. 265, 300-301, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978); *Fullilove* v. *Kreps,* 584 F.2d 600, 607 (2nd Cir. 1978), *cert. granted,* 441 U.S. 960, 99 S.Ct. 2403, 60 L.Ed.2d 1064 (1979), concludes that no undue reverse discrimination would result from the imposition of an entry-level hiring order in this case. *Cf. Weber* v. *Kaiser Aluminum & Chemical Corp.,* _____ U.S. _____, 99 S.Ct. 2721, 61 L.Ed.2d 480 (1979), *Prate* v. *Freedman,* 583 F.2d 42, 46-47 (2d Cir. 1978).

The Second Circuit Court of Appeals has drawn a distinction between hiring "goals" and hiring "quotas." *See Rios* v. *Enterprise Association Steamfitters Local 638, supra,* 501 F.2d at 628 n.3. A hiring goal lapses when a specified number or ratio is achieved, whereas a quota involves the relatively permanent use of a specified hiring ratio. *Id.* While it would appear that a finding of long-continued and egregious discrimination is a pre-

requisite to the imposition of either a goal or a quota, *Id.* at 631, this Court concludes that the imposition of a hiring goal should be approached somewhat less "gingerly" than the imposition of a quota. *Cf. Kirkland* v. *New York State Department of Correctional Services, supra,* 520 F.2d at 427. The imposition of a quota involves a relatively permanent intrusion into the hiring practices of an employer, whereas the imposition of a hiring goal may be, as it is in this case, the only effective means of remedying past discrimination. Accordingly, this Court will impose a hiring goal that will ensure that the minority composition of the total number of firefighters hired since January 1, 1971 (the date on which this Court has found that the City first violated Title VI) reasonably reflects the minority composition of the population of the relevant labor market, the City of Bridgeport. The imposition of a hiring goal of this magnitude, coupled with the requirement that the City actively recruit minority applicants and hire in a nondiscriminatory fashion once the goal is achieved, will be sufficient in this Court's opinion to "eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Louisiana* v. *United States,* 380 U.S. 145, 154 (1965). This Court, therefore, specifically declines to impose a hiring quota.

II.

Since January 1, 1971, the City has hired 152 white, one hispanic, and three black firefighters. The hiring of an additional 102 minority persons would create a situation in which the percentage of minority firefighters hired since January 1, 1971 would roughly equal the percentage of minority persons in the population of the city.[15] In theory, these 102 positions should go to those minority individuals who would have been hired had there been no discrimination. Recognizing that, at this point in time, it is impossible to identify these individuals with any certainty, the Court must exercise its discretion to fashion an equitable means of selecting the individuals to be hired. *See*

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[15]Evidence at the hearing on remand established that the City has an immediate need for 121 firefighters. There is ample room, then, for the 102 whose hiring will be required by this opinion.

Kirkland v. *New York State Department of Correctional Services, supra,* 531 F.2d at 9 (Mansfield, J., dissenting).

As has been noted earlier, the firefighters examinations administered in 1971 and 1975 were not job-related and, therefore, did not distinguish qualified applicants from those who were not qualified. Applicants with some college education tended to do less well on the 1975 exam than similiar applicants without any college education. Those persons who have been hired from the 1975 list have previously been found by this Court to have performed well as firefighters, 454 F.Supp. at 759, and there is no evidence that those hired from the 1971 list have not similarly performed well. The Court finds, then, that those persons who can satisfy the requirements, other than passing an exam, that have been imposed on those who have been hired from the 1971 or 1975 lists are as qualified to become firefighters as those actually hired. Those minority applicants for the 1971 or 1975 tests who meet those qualifications but have not been offered employment have been victims of discrimination and should be offered employment as firefighters. If there are insufficient persons in the group described above to fill all 102 positions, the remainder should be filled, if possible, by persons who were deterred by the City's discriminatory practices from applying to take either the 1971 or the 1975 exam. While recognizing that the process of identifying this latter group of individuals may be complex administratively, the Court concludes that making the effort to identify these individuals is the best available mean of ensuring that the benefits from this remedy order enure to individuals who have been the victims of the City's discriminatory practices. Moreover, procedures are available to ease the administrative burden.

Back pay also is an appropriate remedy in this case. Awards of back pay "provide a spur to speed the elimination of discriminatory practices, and they give full compensation to the injured parties." *Stryker* v. *Register Publishing Co.,* 423 F. Supp. 476, 478 (D. Conn. 1976). The Supreme Court has made clear that "given a finding of unlawful discrimination, back pay should be denied only for reasons which, if applied generally,

would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." *Albemarle Paper Co.* v. *Moody, supra,* 422 U.S. at 421. Accordingly, this Court will order that back pay be awarded to up to 102 individuals who can prove that they have been victims of the City's discriminatory policy and practice.

In accordance with the foregoing, the following hereby is Ordered:

A. OLD EXAMS

The test batteries given as written exams to firefighter candidates in 1971 and 1975 shall not again be used to test firefighter applicants.

B. HIRING

(1) The City promptly shall prepare a list of 102 minority persons to be offered positions as firefighters. This list shall include:

> (a) The black and hispanic persons who filed applications for either the 1971 or 1975 test, who have not been offered but still seek employment with the Fire Department, and who pass both the agility test and medical examination to be administered by the City. Said agility test and medical examination shall be given to these persons within 120 days of this order, shall be preceded by both published notice and individual written notice to each of those black and hispanic persons who filed applications for the 1971 or 1975 firefighters test, and shall be no more rigorous than those that have been administered to the firefighters hired since January 1, 1971.

(b) Sufficient additional minority persons chosen in accordance with this subparagraph to reach the total of 102 persons. The persons chosen under this subparagraph shall be individuals who prove to the special master that after January 1, 1971 they were deterred by the City's discriminatory practices from applying to take either the 1971 or 1975 test, and who pass both the agility test and medical examination to be administered by the City. The following procedure shall be used to identify these persons:

(i) The special master shall, in a manner he deems appropriate, publicize the fact that he will be accepting applications from minority persons who claim that after January 1, 1971 they were deterred by the City's discriminatory practices from filing applications for either the 1971 or 1975 firefighters test. The special master shall set and publicize a reasonable deadline for the submission of such applications.

(ii) The special master shall process the applications in a manner consistent with this opinion, and may hold hearings or other proceedings as he deems appropriate.

(iii) Each individual applicant shall bear the burden of proving by a preponderance of the evidence that he or she would have applied but for the City's discriminatory practices.

(iv) The special master need not process every application, but may choose among them at random until sufficient applications have been processed to complete the list of 102 minority persons to be offered employment.

(v) The agility test and medical examinations shall be administered to persons chosen by the special

master at a time to be determined by the special master, and shall be preceded by written notice to the individuals to be tested and examined. The agility test and medical examination shall be no more rigorous than those that have been administered to the firefighters hired since January 1, 1971.

(c) If the procedures under subparagraphs (a) and (b) of this paragraph fail to produce sufficient individuals to fill the 102 places on the list, the City, subject to the Court's approval, promptly shall devise some other method for identifying additional minority persons to be placed on the list.

(2) Notwithstanding the above, the City shall not be obligated to place on the list the name of anyone who

(a) on or before the date of the exam for which he or she applied or would have applied but for the City's discrimination

(i) was not eighteen years of age;

(ii) had not graduated from high school or earned a high school equivalency certification;

(iii) did not possess a valid Connecticut driver's license; or

(iv) had not been a bona fide resident of Bridgeport for the past year; or

(b) does not possess a valid Connecticut driver's license on the date the name otherwise would be placed on the list, but

(c) nothing in this paragraph shall alter or limit the City's obligation ultimately to place 102 names on the list.

(3) As quickly as possible within the limits of the City's ability to train new firefighters, the City shall offer the 102 persons on the list active employment as firefighters and shall place those who accept on active duty. The City shall make a good faith effort to maximize its ability to train firefighters. No other individuals shall be hired as firefighters until all of the individuals on the list have been offered active employment.[16]

(4) Subsequent appointments to the rank of firefighter shall be made in strict accordance with Titles VI and VII of the Civil Rights Act of 1964.

(5) The City actively shall recruit minority persons to compete for future vacancies in the Fire Department.

(6) This Court shall retain jurisdiction over this case until the provisions of this Order have been complied with.

C. SENIORITY

The City is prohibited from giving any promotional examinations to firefighters hired from lists generated by the 1971 or

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[16]The United States, as *amicus,* has suggested with some force that requiring the City to hire only minority persons until a specified goal is reached will have the unwanted effect of creating segregated training programs and a racially stratified work force within the Fire Department. The Government's suggested means of avoiding these undesirable consequences is to impose a 50% interim hiring goal that would lapse when the proportion of minority persons employed by the Fire Department reached some predetermined reasonable level. While this suggestion has obvious merit, the Court is reluctant to enter such an order because it could significantly increase defendants' "front pay" liability. In addition, a 50% interim goal would be unacceptable because it would not result in the hiring of enough minority persons soon enough. The Court would not be opposed, however, to some more realistic plan that would permit immediate integrated hiring while remaining otherwise consistent with the remedial goals sought to be achieved through this Order. Defendants are invited to submit such proposals as they deem appropriate.

1975 tests until such time as all the firefighters hired pursuant to B(1)(a) & (b) become qualified to take the promotional examinations.[17] Although the Court is specifically declining to alter the three-year time-in-grade requirement that now exists for firefighters who wish to take the promotional examination for the positions of Pump Engineer and Lieutenant, the Court is not opposed to a reduction of this requirement. The plausibility of reducing the time-in-grade requirement by establishing an improved training program for all firefighters involves a decision that must be left to the experienced judgment of the authorities in the Fire Department. Until such time as promotional examinations are administered, the City may fill promotional vacancies on an acting or provisional basis, except that acting or provisional supervisors shall not be given any preference in the selection of permanent supervisors. In selecting acting or provisional supervisors, the City is urged to take cognizance of the prior firefighting experience of a number of the plaintiffs.

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[17]The Supreme Court has held that "the denial of seniority relief to victims of illegal racial discrimination is permissible 'only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy, and making persons whole for injuries suffered through past discrimination.'" *Franks* v. *Bowman Transportation Co.*, 429 U.S. 747, 771 (1976), *quoting Albermarle Paper Co.* v. *Moody*, 422 U.S. 405, 421 (1975). Seniority relief is appropriate in this case. The relief granted here will not result in anyone being "bumped," *EEOC* v. *Local 628*, 532 F.2d 821, 830 (2d Cir. 1976), *on remand* No. 71 Civ. 2877 (S.D.N.Y. Jan. 19, 1977). *aff'd* 565 F.2d 31 (2d Cir. 1977), and those whose promotion may be delayed have been "the modest beneficiar[ies], vis-a-vis the minority work force, of a policy that discouraged minority persons" from obtaining employment on the Fire Department. *Patterson* v. *Newspaper & Mail Deliverers' Union*, 514 F.2d 767, 775 (2d Cir. 1975), *cert. denied* 427 U.S. 911, 96 S.Ct. 3198, 49 L.Ed.2d 1203 (1976). The seniority relief granted here, then, will not have undue "reverse discrimination" effects. *Cf. Weber* v. *kaiser Aluminum & Chemical Corp.* _____ U.S. _____, 99 S.Ct. 2721, 61 L.Ed.2d 480 (1979).

D. BACK PAY

(1) The City promptly shall generate a list of up to 102 persons to be awarded back pay. This list shall include:

(a) Each of the persons whose name is placed on the hiring list pursuant to B(1)(a) or (b).

(b) If fewer than 102 persons qualify under subparagraph (a) of this paragraph, additional minority persons chosen in accordance with this subparagraph up to a maximum of 102. Persons chosen in accordance with this subparagraph shall be minority persons who applied to take either the 1971 or 1975 exam whose names are not placed on the hiring list pursuant to B(1)(a) but who prove to the special master, by a preponderance of the evidence, that on the date of the exam for which they applied, they

(i) were eighteen years of age,

(ii) had graduated from high school or earned a high school equivalency certification.

(iii) possessed a valid Connecticut driver's license,

(iv) had been a bona fide resident of Bridgeport for the past year, and

(v) would have passed the agility test and medical examination administered to applicants who did pass one of the exams.

If fewer than 102 individuals qualify for back pay under subparagraph (a) of this paragraph, the special master shall notify each of the individuals potentially eligible for back pay under this subparagraph that they may file applications for back pay awards, and shall set a reasonable deadline for the filing of such applications. He need not process every application, but may

choose among them at random until sufficient applications have been processed to fill the total of 102 places on the back pay list.

(c) If fewer than 102 individuals qualify under subparagraphs (a) and (b) of this paragraph, additional minority persons chosen in accordance with this subparagraph up to a maximum of 102. Persons chosen in accordance with this subparagraph shall be minority persons whose names are not placed on the hiring list pursuant to B(1)(b) but who prove to the special master by a preponderance of the evidence that but for the defendants' discriminatory practices they would have applied to take either the 1971 or 1975 exam, and that on the date of the exam for which they would have applied they

(i) were eighteen years of age,

(ii) had graduated from high school, or earned a high school equivalency certification,

(iii) possessed a valid Connecticut driver's license,

(iv) had been a bona fide resident of Bridgeport for the past year, and

(v) would have passed the agility test and medical examination administered to applicants who did pass one of the exams.

If fewer than 102 individuals qualify for back pay under subparagraphs (a) and (b) of this paragraph, the special master, in a manner he deems appropriate, shall publicize the fact that he will be accepting applications from individuals who claim to meet the requirements of this subparagraph, and shall set a reasonable deadline for the filing of such applications. He need not process every application, but may choose among them at random until sufficient applications have been processed to fill the total of 102 places on the back pay list.

(d) If fewer than 102 individuals qualify under subparagraphs (a), (b), & (c) of this paragraph, the remaining places on the back pay list shall remain vacant.

(2) Each of the persons whose name is placed on the back pay list shall be entitled to accumulated back pay at the time his or her name is placed on the list.

(3) For the purposes of this order, back pay shall include

(a) the sum of the value of all regular and overtime wages, fringe benefits, pension benefits, and all other benefits to which firefighters are or were entitled under union contracts, including all increments, together with interest and, for those individuals whose names are on the hiring list established pursuant to this Order, "front-pay" until the date the individual is offered active employment,

(b) reduced by the sum of amounts earned or earnable with reasonable diligence and amounts of any welfare or unemployment compensation received.

(4) The individuals whose names are on the list who either applied to take or were deterred by defendants' discriminatory practices from applying to take the 1971 test shall be awarded back pay from October, 1973 (two years prior to the filing of the first complaint with the EEOC).

(5) The individuals whose names are on the list who either applied to take or were deterred by defendants' discriminatory practices from applying to take the 1975 test shall be awarded back pay from October, 1976 (when the first firefighter was hired from the 1975 list).

(6) While considerations of back pay liability may not enter into determining whose names shall be placed on the list, the City may, if it chooses, offer active employment to those on the hiring list in an order that will minimize its liability for "front

pay." It would seem to make sense in terms of both economics and social policy for the City to offer active employment first to those with the least present income.

E. SPECIAL MASTER

The Court has had the good fortune to obtain the assistance of David S. Maclay, Esquire, of Westport, Connecticut, a member of the Bar of this Court, as a special master. The special master shall oversee the implementation of this Order. It shall be his duty to hear individual claims in order to determine those persons entitled to have their names placed on the lists, and to compute the back pay to which these persons may be entitled. The special master shall file a final report with this Court and may file such interim reports from time to time as he shall deem advisable. The special master shall be entitled to reasonable compensation by defendants for his services.

F. COSTS AND ATTORNEYS' FEES

Plaintiffs hereby are granted their court costs and reasonable attorneys fees to date. The amount of such fees shall be set by the Court after a hearing to be scheduled in the future. Costs and attorneys' fees for work done in the future shall be fixed in such manner as the Court may determine is appropriate.

The Revenue Sharing Act

The Revenue Sharing Act, 31 U.S.C. § 1242, confers upon this Court the power to order the suspension, termination, or repayment of revenue sharing funds when a governmental unit receiving such funds has been found to have discriminated in employment on the basis of race, color, or national origin. The Court reserves decision, pending compliance with this Order, as to whether to impose any remedy pursuant to this Act. As noted in its earlier decision, the Court views the termination of federal funding as a last resort. 454 F. Supp. at 753, *citing generally United States* v. *City of Chicago,* 549 F.2d 415, 449 (7th Cir. 1977).

Conclusion

The Court finds that defendants have violated Titles VI and VII of the Civil Rights Act of 1964 and the Revenue Sharing Act. Judgment in accordance with this opinion shall enter for the plaintiffs on their complaint. Defendants' counterclaim and defendants-intervenors' cross-complaint are dismissed. Pending compliance with this judgment, the Court retains jurisdiction and reserves decision on whether to impose a remedy under the Revenue Sharing Act.

IT IS SO ORDERED.

APPENDIX C

ASSOCIATION AGAINST DISCRIMINATION IN EMPLOYMENT et al., Plaintiffs-Appellees-Cross-Appellants,

v.

CITY OF BRIDGEPORT et al., Defendants-Appellants,

and

Bridgeport Firefighters for Merit Employment, et al., Intervening Defendants-Appellants.

Nos. 413, 414 and 595, Dockets 78-7400, 78-7406 and 78-7431.

United States Court of Appeals, Second Circuit.

Argued Dec. 18, 1978.

Decided Feb. 23, 1979.

Class action was brought on behalf of blacks and Hispanics attacking civil service employment examination for city fire department as violative of Title VII of Civil Rights Act of 1964. The United States District Court for the District of Connecticut, T. F. Gilroy Daly, J., held the examination invalid, 454 F.Supp. 751, and enjoined use of the test and ordered affirmative relief, 454 F.Supp. 758, and defendants appealed and plaintiffs cross-appealed. The Court of Appeals, Feinberg, Circuit Judge, held that: (1) before imposing very broad hiring quota relief for use by city of allegedly invalid fire fighter test which had disparate impact in violation of Title VII of Civil Rights Act of 1964, court was required to expressly consider the relevant authorities ties and either make appropriate findings or state why it believed they were not necessary; (2) court was also required to give close consideration to effect of its interim orders permitting the hiring of 84 firefighters, 81 of whom were white, and (3) district court was also required to consider city's offer to lower the passing grade on a test which court had invalidated in order to

increase the number of minority applicants who would be eligible for appointment.

Order vacated and cause remanded.

Raymond B. Rubens, Bridgeport, Conn., for defendants-appellants City of Bridgeport, et al.

J. Daniel Sagarin, Bridgeport, Conn. (Sagarin & Rutkin, Bridgeport, Conn., of counsel), for intervening defendants-appellants Bridgeport Firefighters for Merit Employment, Inc., et al.

David N. Rosen, New Haven, Conn. (Michael P. Koskoff, Bridgeport, Conn., of counsel), for plaintiffs-appellees-cross-appellants Association Against Discrimination in Employment, et al.

Before FEINBERG, MULLIGAN and GURFEIN, Circuit Judges.

FEINBERG, Circuit Judge:

This appeal arises out of a Title VII class action in the United States District Court for the District of Connecticut, brought by 10 black and hispanic applicants to the Bridgeport Fire Department, and by an organization representing plaintiffs' interests, against various municipal officials and agencies and the City of Bridgeport.[1] In the district court, several incumbent white firefighters and an organization they had formed in response to the action were allowed to intervene as defendants. Defendants and the intervenors appeal from an order of Judge T F. Gilroy Daly that invalidated an examination for the job of firefighter,

[1]The officials named as defendants, individually and in their official capacities, are the members of the Bridgeport Civil Service Commission, the Director of the Civil Service Commission, the members of the Bridgeport Board of Fire Commissioners, and the Fire Chief and Mayor of Bridgeport.

enjoined defendants from using that test, and directed them to hire minority applicants for that job in ratios and under conditions specified in the order. The judge's two opinions, one dealing with liability and the other with remedy, are reported at 454 F.Supp. 751, 758. Plaintiffs cross-appeal, complaining of the judge's order in various aspects. For reasons set forth below, we remand the case to the district court for further consideration in accordance with this opinion.

I.

In February 1972, members of the Bridgeport Civil Service Commission, as is the case here, were sued in an action under 42 U.S.C. §§ 1981 and 1983 by black and Puerto Rican applicants for positions in the Bridgeport Police Department, who claimed that the Department's employment policies discriminated against them.[2] In March 1972, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., became applicable for the first time to states and political divisions as employers.[3] Perhaps motivated by these two events at least in part, the City of Bridgeport joined in March 1972 with 10 other Connecticut municipalities to hire a supposedly expert firm to develop a racially unbiased examination for the position of firefighter. Such action was well advised in view of the lack of blacks and hispanics in the Fire Department. In 1975 when these groups comprised about 41 percent of Bridgeport's labor force, its Fire Department had 427 whites, one hispanic and no blacks. No manner of legal argument can justify this unpleasant fact. From 1972 to 1975, while the new test was being developed, defendants gave no tests and hired only 28 white firefighters from a 1971 list, apparently now discredited. In March 1975, the new

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[2]See *Bridgeport Guardians, Inc.* v. *Bridgeport Civil Service Comm'n,* 482 F.2d 1333 (2d Cir. 1973), cert. denied, 421 U.S. 991, 95 S.Ct. 1997, 44 L.Ed.2d 481 (1975). See also *Bridgeport Guardians* v. *Bridgeport Police Dep't,* 431 F.Supp. 931 (D.Conn. 1977); *Armeno* v. *Bridgeport Civil Service Comm'n,* 446 F.Supp. 553 (D.Conn. 1978).

[3]Equal Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (March 24, 1972).

test was administered to over 700 people, and defendants created a list of almost 200 successful applicants ranked in order. Only eight minority applicants were on the list.

In September 1975, plaintiffs filed the complaint in this case alleging that the discriminatory hiring and promotion practices of the Bridgeport Fire Department violated Title VII.[4] The intervening defendants were allowed in the litigation in July 1976. Shortly thereafter, when the City indicated that it wanted to begin hiring firefighters from the 1975 list, plaintiffs moved for a preliminary injunction, challenging the 1975 test as discriminatory. After a chambers conference before Judge Jon O. Newman, all the parties consented to an order which allowed defendants to fill one-half of the then current vacancies, and the City hired 40 firefighters from the list. In June 1977, the parties consented before Judge Robert C. Zampano to a similar order, which authorized the hiring of 44 more firefighters.

In October 1977, plaintiffs were certified as representatives of the class of all black and hispanic victims of defendants' alleged employment discrimination. Thereafter, Judge Daly conducted an 11-day nonjury trial on the issues of liability, at which a number of expert witnesses testified. In July 1978, the judge ruled in favor of plaintiffs. 454 F.Supp. 751. The judge noted that plaintiffs could prove a prima facie violation of Title VII by showing either that defendants had intentionally treated minorities differently or that the 1975 test had a disparate impact on them. See, e.g., *Furnco Construction Corp.* v. *Waters*, _____ U.S. _____, 98 S.Ct. 2943, 2952-53, 57 L.Ed.2d 957 (1978) (Marshall, J., concurring and dissenting); *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 335-36 n.15, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977). The judge found for plaintiffs on the latter theory relying on the following data:

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[4]Plaintiffs also asserted claims under 42 U.S.C. §§ 1981 and 1983 but later withdrew them.

> [A]t the time the firefighters exam was given, minorities constituted 41% of Bridgeport's population, but only 2% of its Fire Department.
>
> The firefighters exam did little to alter this imbalance.... In terms of the pass rate, minority candidates passed with one-third the frequency of nonminority candidates; a 9% minority pass rate as compared with a 27% nonminority pass rate.

454 F.Supp. at 754. Since disparate impact was shown, the judge held that defendants had the burden of proving that the 1975 test was substantially job related. See *Dothard* v. *Rawlinson,* 433 U.S. 321, 329, 97 S.Ct. 2720, 53 L.Ed.2d 786 (1977); *Vulcan Society* v. *Civil Service Commission,* 490 F.2d 387, 393 (2d Cir. 1973). Judge Daly found that defendants did not meet this burden because of deficiencies in preparation of the test and in selection of the passing score. The judge also noted that defendants' efforts to recruit minorities to take the examination had been unsatisfactory, although he observed that

> there appears to be no bad faith on the part of defendants in using the exam or in selecting [a] respected management consulting firm...to develop the exam. Defendants made a substantial effort to obtain an exam that would withstand judicial scrutiny.

454 F.Supp. at 757. Since the judge found for plaintiffs on the theory of disparate impact, he did not reach any claim of intentional discrimination.

After a one-day hearing devoted to remedy issues, the judge issued a "Remedy Order," which granted sweeping affirmative relief, including hiring quotas. 454 F.Supp. 758. In addition to declaring the 1975 test invalid and enjoining its use in the future, the judge ordered that the City immediately hire all blacks and hispanics who had filed applications to take the 1975 exam, if they met physical, residency and other objective requirements. Hiring of only minority applicants would continue until the

number hired since 1975 equalled the number of whites hired since 1975. Thereafter, white and minority applicants would be hired on a 1:1 ratio until the number of minority firefighters in the Department totalled 125.[5] These provisions were incorporated into an order, dated August 4, 1978, which is the subject of the appeal and cross-appeal now before us.[6]

II.

On the main appeal, defendants first strenuously urge that the district judge erred in finding the 1975 test discriminatory.[7] Defendants claim that the judge misconstrued the burden of persuasion that they had to meet, that the judge improperly adopted as a matter of law a theory of employment testing that had been justifiably rejected by the consulting firm, and that defendants' selection of an appropriate employment test was an administrative decision that cannot be overturned if there is substantial evidence to support it. With regard to the remedy provisions, defendants particularly attack the imposition of a quota, which they contend is unconstitutional, barred by section 703(j) of Title VII, 42 U.S.C. § 2000e-2(j), and unwarranted on the facts of this case. Plaintiffs rejoin in kind, arguing that the judge applied proper legal standards in determining the unlawfulness of the 1975 test, that his factual findings were not clearly erroneous, that the hiring quota was an appropriate,

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[5]The order also included provisions regarding pro .otion, retroactive seniority, back pay and attorneys' fees.

[6]The judgment was stayed by another panel of this court in November 1978.

[7]Hereafter, unless otherwise indicated, we will use defendants to refer to both appellants and to the intervenors, Bridgeport Firefighters for Merit Employment, Inc., et al.

indeed moderate, exercise of discretion, and that the provision for monetary relief did not go far enough.[8]

Included in these contending arguments are issues of the gravest kind, which have been the subject of intensive scrutiny in this and in other courts, and have not yet been definitively decided at the highest level. See, e.g., *Regents of the University of California* v. *Bakke,* 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978); *DeFunis* v. *Odegaard,* 416 U.S. 312, 94 S.Ct. 1704, 40 L.Ed.2d 164 (1974). See also *Davis* v. *County of Los Angeles,* 566 F.2d 1334 (9th Cir. 1977), cert. granted, 437 U.S. 902, 98 S.Ct. 3087, 57 L.Ed.2d 1132 (June 19, 1978) (argued Dec. 5, 1978, see 47 U.S.L.W. 3406); *Weber* v. *Kaiser Aluminum & Chemical Corp.,* 563 F.2d 216 (5th Cir. 1977), cert. granted, _____ U.S. _____, 99 S.Ct. 608, 58 L.Ed.2d 676 (1978). We recognize, however, our obligation to resolve these questions as best we can, guided by the decisions to date in the Supreme Court and by our own precedents. However, the state of the record as it comes to us in this case gives us pause, for the following reasons:

1. In his brief memorandum "Remedy Order," issued after a short hearing on remedy issues, the district judge did not refer to any of this court's recent decisions dealing with quotas, e.g., *EEOC* v. *Local 638,* 565 F.2d 31 (1977); *EEOC* v. *Local 14, International Union of Operating Engineers,* 553 F.2d 251 (1977); *Chance* v. *Board of Examiners,* 534 F.2d 993 (1976), cert. denied, 431 U.S. 965, 97 S.Ct. 2920, 53 L.Ed.2d 1060 (1977); *EEOC* v. *Local 638,* 532 F.2d 821 (1976); *Kirkland* v. *New York State Department of Correctional Services,* 520 F.2d

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[8]Plaintiffs on cross-appeal argue that the court erred in limiting back pay to those minority persons who actually applied to take the 1975 exam and are appointed pursuant to the court's order, and in excluding those who took the exam in 1975 but no longer desire appointment or no longer meet the prerequisites for appointment and those who were deterred from applying by defendants' past discriminatory practices, *see Int'l Bhd. of Teamsters* v. *United States, supra,* 431 U.S. at 364-71, 97 S.Ct. 1843.

420, rehearing en banc denied, 531 F.2d 5 (1975), cert. denied, 429 U.S. 823, 97 S.Ct. 73, 50 L.Ed.2d 84 (1976); *Patterson* v. *Newspaper & Mail Deliverers' Union,* 514 F.2d 767 (1975), cert. denied, 427 U.S. 911, 96 S.Ct. 3198, 49 L.Ed.2d 1203 (1976); *Rios* v. *Enterprise Association Steamfitters Local 638,* 501 F.2d 622 (1974); *Vulcan Society* v. *Civil Service Commission,* 490 F.2d 387 (1973); *Bridgeport Guardians, Inc.* v. *Bridgeport Civil Service Commission,* 482 F.2d 1333 (1973), cert. denied, 421 U.S. 991, 95 S.Ct. 1997, 44 L.Ed.2d 481 (1975); *United States* v. *Wood, Wire & Metal Lathers International Union, Local 46,* 471 F.2d 408, cert. denied, 412 U.S. 939, 93 S.Ct. 2773, 37 L.Ed.2d 398 (1973). These cases have been the occasion for some strong differences of opinion, reflecting in large part the conflicting views also held in other courts[9] and indeed, in the nation as a whole on the propriety of quota relief. Looking to the decisions of our own court, it is reasonably clear that for

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[9]Compare, e.g., *Boston Chapter, NAACP, Inc.* v. *Beecher,* 504 F.2d 1017, 1026-28 (1st Cir. 1974) cert. denied, 421 U.S. 910, 95 S.Ct. 1561, 43 L.Ed.2d 775 (1975); *Contractors Association* v. *Secretary of Labor,* 442 F.2d 159, 171-74, 176-77 (3d Cir.), cert. denied, 404 U.S. 854, 92 S.Ct. 98, 30 L.Ed.2d 95 (1971); *Morrow* v. *Dillard,* 580 F.2d 1284, 1291-96 (5th Cir. 1978); *Morrow* v. *Crisler,* 491 F.2d 1053 (5th Cir.) (en banc), cert. denied, 419 U.S. 895, 95 S.Ct. 173, 42 L.Ed. 139 (1974); *United States* v. *Local 212, IBEW,* 472 F.2d 634 (6th Cir. 1973); *United States* v. *City of Chicago,* 549 F.2d 415, 436-37 (7th Cir.), cert. denied, 434 U.S. 875, 98 S.Ct. 225, 54 L.Ed.2d 155 (1977); *Carter* v. *Gallagher,* 452 F.2d 315, 327 (8th Cir.) (en banc), cert. denied, 406 U.S. 950, 92 S.Ct. 2045, 32 L.Ed.2d 338 (1972); *United States* v. *Ironworkers Local 86,* 443 F.2d 544, 552-54 (9th Cir.), cert. denied, 404 U.S. 984, 92 S.Ct. 447, 30 L.Ed.2d 367 (1971) with, e.g., *Oburn* v. *Shapp,* 521 F.2d 142, 150 n. 20 (3d Cir. 1975); *Sledge* v. *J. P. Stevens & Co.,* 585 F.2d 625, 644-50 (4th Cir. 1978); *Morrow* v. *Crisler, supra,* 491 F.2d at 1058 (Clark, J., concurring), id. at 1060 (Roney, J., joined by Bell & Ainsworth, JJ., concurring specially), id. at 1061 (Coleman, J., dissenting), id. at 1064 (Gee, J., concurring in part and dissenting in part); *Carter* v. *Gallagher,* 452 F.2d 315 (8th Cir. 1971) (original panel decision), modified, 452 F.2d 327. See also *Hull* v. *Cason,* 151 Cal. Rptr. 438 (Calif. Ct. App. 1978); *Hiatt* v. *City of Berkeley,* 149 Cal. Rptr. 155 (Ct. App. 1978).

some of its members quota relief can constitutionally be justified only if necessary to redress "a clear-cut pattern of long-continued and egregious racial discrimination," and if the reverse discriminatory effects of the quota do not fall upon "a small number of readily identifiable" nonminority persons. *Kirkland* v. *New York State Department of Correctional Services, supra,* 520 F.2d at 427, 429. See also *EEOC* v. *Local 638, supra,* 532 F.2d at 828. We do not suggest that these conditions on imposition of quotas reflect the views of all members of the court, see *Kirkland* v. *New York State Department of Correctional Services, supra,* 531 F.2d 5 (Mansfield, J., dissenting from denial of rehearing en banc, joined by Kaufman, C. J., and Oakes, J.), or even of all members of this panel,[10] but the decisions cited above indicate that these views command considerable support.

Defendants characterize the district judge's order here as granting "the broadest quota hiring remedy...in any municipal employment testing case, including those in which there had been findings of intentional discrimination."[11] Whether or not this statement is accurate, the quota relief here is very broad, and before imposing it the district judge should expressly consider the relevant authorities and either make appropriate findings or state why he believes they are not necessary. The findings might include, e.g., whether the court is relying on discrimination between 1972 and 1975 or prior to 1972, and, if so, on what theories, see, e.g., *Hazelwood School District* v. *United States,* 433 U.S. 299, 309 & n. 15, 97 S.Ct. 2736, 53 L.Ed.2d 768 (1977); *United Airlines, Inc.* v. *Evans,* 431 U.S. 553, 97 S.Ct. 1885, 52 L.Ed.2d 571 (1977); *International Brotherhood of Teamsters* v. *United States, supra,* 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396, and why the quota required the hiring of minorities and non-minorities in approximately a 1:1 ratio when

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[10] See *EEOC* v. *Local 638, supra,* 532 F.2d at 833-34 (Feinberg, J., concurring); *Patterson* v. *Newspaper & Mail Deliverers' Union, supra,* 514 F.2d at 775 (Feinberg, J., concurring).

[11] Brief for intervenors at 26.

minorities constituted only roughly 11 percent of those who took the test. See *EEOC* v. *Local 14, supra,* 553 F.2d at 256-57; *Vulcan Society* v. *Civil Service Commission, supra,* 490 F.2d at 398-99. The district court also should take into account, to the extent relevant, cases of this circuit decided since its original order. See, e.g., *Fullilove* v. *Kreps,* 584 F.2d 600, 606-09 (2d Cir. 1978); *Prate* v. *Freedman,* 583 F.2d 42 (2d Cir. 1978).

2. During the course of this litigation, the district court, as outlined above, twice authorized defendants to hire firefighters from the list resulting from the 1975 test. The first time, the order of Judge Newman provided, in relevant part:

> [T]he defendants may make at any time appointments to the Bridgeport Fire Department of a number of firefighters equal to one-half the number for which the city warrants there is and will remain an immediate need and adequate funding. In the event the Court should order a hiring plan, these appointments will be counted as part of such plan.

Pursuant to this order, defendants hired 40 firefighters from the 1975 list. Under a similar arrangement, almost a year later, defendants hired 44 more firefighters from the list. Only three of these 84 positions went to black or hispanic applicants.

It is apparent that these hirings represented a partial compromise of contending views to meet the City's pressing need for firefighters, a sensible attempt at accommodation under the circumstances. But the implications of such an agreement are unclear. The 84 firefighters thus employed apparently received permanent, not temporary, appointments. Were that not so, the district judge probably could have remedied the allegedly discriminatory test results by ordering the prompt preparation (in consultation with representatives of plaintiffs)[12] of a properly

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[12]See *Chance* v. *Board of Education,* 496 F.2d 820, 823 (2d Cir. 1974); *Chance* v. *Board of Examiners,* 458 F.2d 1167, 1179 & n. 23 (2d Cir. 1972).

job-related test[13] and more energetic recruitment of minority applicants to take it, and by then filling all jobs — including the 84 just referred to — in a nondiscriminatory fashion. While this course is still a possibility,[14] we recognize that conversion of court-supervised hirings from permanent to temporary would destroy legitimately held expectations. On the other hand, the district judge pointed out that

> these men [the 84 already hired] have not demonstrated that they are intellectually more qualified to be firefighters than the applicants who failed. Moreover, since testimony at the remedy hearing indicated that these eighty-four men are performing their duties adequately, it is fair to assume that all of the applicants who are able to pass the same agility test and

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[13]We agree with the judge's observation:

The Court also finds it peculiar that exams, such as the firefighter exam, tend to place so little emphasis on physical ability. It would seem that the physical ability necessary for a qualified firefighter is neither more difficult to identify nor more complicated to measure than the intelligence level of a qualified firefighter.

454 F.Supp. at 758 n.8. See also *Vulcan Soc'y* v. *Civil Serv. Comm'n, supra,* 490 F.2d at 397-98.

Plaintiffs have suggested that merely giving a new nondiscriminatory exam, even with active recruitment of minority applicants, is inadequate to overcome a long history of notorious discriminatory hiring policies and quota relief is necessary to assure prospective minority candidates that applying is no longer futile. We express no view on this theory since it is unclear whether the district court made such a finding.

[14]Unexpectedly, the City apparently suggests retesting all the 1975 applicants, including those now on the job, if we affirm the invalidation of the 1975 list, Brief for City of Bridgeport at 11, 13, but plaintiffs reject the notion, Brief for Appellees at 59 n. 39. We note that such a procedure might perpetuate the effects of the 1975 discriminatory examination, since presumably the 84 candidates who have gained on-the-job experience would have an advantage on any job-related test.

medical examination will be capable of performing at least as well as the eighty-four men already hired.

454 F.Supp. at 759.

This observation, coupled with the prior two compromise agreements for hiring, raises the question whether it can fairly be said that in return for such job protection for the 84 firefighters already hired, all parties impliedly agreed that if the test were held invalid, 84 blacks and hispanics could then be ordered hired. Indeed, plaintiffs make precisely that argument to us.[15] Such a quota, imposed as part of a court-supervised settlement, would be subject to unique considerations. Cf. *Prate* v. *Freedman, supra,* 583 F.2d at 47; *Patterson* v. *Newspaper & Mail Deliverers' Union, supra,* 514 F.2d 767; *Weber* v. *Kaiser Aluminum & Chemical Corp., supra,* 563 F.2d 216. Conversely, the intervenors argue that plaintiffs might have attempted to enjoin preliminarily any use of the 1975 test but chose to avoid an early hearing and agreed to immediate appointment of some firefighters (including three minority group members) in exchange for guaranteed funding for positions which might, but not necessarily would, be assigned to minority group members.[16] The implications of this view are not helpful to plaintiffs. In any event, the district court did not explicitly consider all the implications of the two prior hiring orders,[17] and should do so in the first instance.

3. Finally, we turn to an equally troubling issue that directly affects not only the remedy ordered by the judge, but also the basic finding of liability. The district court stated that "the ulti-

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[15]Brief for Appellees at 41.

[16]Brief for Intervenors at 54, 55.

[17]The City argues that it never would have hired the 84 firefighters who passed the 1975 test if it had known that this would make it liable for a potentially bankrupting back pay award to 84 minority firefighters who were not hired. Brief for City of Bridgeport at 16-17.

mate effect of the exam turns upon the score used to differentiate between passing and failing" and that this "critical choice" had to be "scrutinized with particular care" because this decision was partly responsible for the disparate impact of the exam. All those who scored in or above the 75th percentile of those taking the exam passed. The passing score was 12. The judge then determined that the "only explanation" for the passing score of the 75th percentile was "the arbitrary requirement of Bridgeport's City Charter" that candidates "answer correctly at least 75% of all questions on civil service exams." 454 F.Supp. at 756-57 & n. 6. The judge correctly characterized application of this requirement to the firefighter exam as bearing "no relation" to job proficiency,[18] particularly since the consultant firm that prepared the exam did not recommend a passing score. Indeed, defendants conceded in the district court that the test was not scored properly and urged the judge to lower the passing score, which would also have eliminated most of the disparate effect of the exam. The district court dealt with this contention as follows:

> The discriminatory impact of the exam would have been significantly alleviated if the passing score had been designated as 6. If this score had been used, 55.2% of the Blacks and 68.6% of the Whites would have passed. Plaintiffs contend that even with such an alteration of the passing score, the exam would be discriminatory because only 9.2% of the total number of candidates to pass would be members of minority groups. The force of this contention is weakened by the fact that only 10.9% of those who applied to take the firefighters exam were members of minority groups.

454 F.Supp. at 756 n. 5.

Defendants repeat to us their offer to lower the passing score, stressing that the district court found that the City had made a

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[18] In fact, the passing score bore no relation to the City Charter's requirement, since the percentile score indicates only how well an applicant did in relation to other candidates, and not the number of questions answered correctly. 454 F.Supp. at 756-57 n. 6.

good faith effort to develop a job-related test, that a lower passing score would eliminate the disparate impact, and that there was substantial evidence that such a passing score was justifiable. A cut-off score of six would apparently qualify approximately 50 identified blacks and hispanics as well as over 300 whites and some 70 racially unidentified persons, and the effectiveness of the list could be continued, by order of the court, until all passing candidates have been hired.[19] We do not regard this as a frivolous argument. The principal, although not the only, basis of the district court's finding of violation of Title VII was the disparate impact of the test at the arbitrary 75th percentile passing score, and we do not find the district judge's response to the City's argument, quoted above, thoroughly convincing. It may be that if the passing mark had originally been six, there would have been no showing of disparate impact in the first place and that, hence, there would have been no ground for deciding whether the test was job-related. See *Albermarle Power Co.* v. *Moody,* 422 U.S. 405, 425, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975); *Dothard* v. *Rawlinson,* 433 U.S. 321, 329, 97 S.Ct. 2720, 53 L.Ed.2d 786 (1977). The percentage of identified blacks and hispanics who would then have passed the examination (about 50 in number) would be much closer to the percentage of whites passing than was the case with the 75th

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[19]Defendants make clear they would not object to such an extension of the life of the list past the two years provided by law. However, plaintiffs argue that since there would still be fewer positions available in the Fire Department than the number of applicants who scored six or above, many would still have a long wait. They further point out that if applicants were hired in order of rankings from the exam, minority candidates generally would be hired later, and thus the exam would have a significant discriminatory impact even though lowering the score closes up the discrepancy in passing rates. However, this effect could be eliminated by random selection of appointees from the group of passing candidates, rather than use of rankings.

percentile passing score.[20] That would not be the end perhaps because, while the earlier history of discrimination before 1972 could not be controlling in this Title VII case, see text following note 11 *supra,* the use of a ranking rather than a qualifying examination could nevertheless still be argued as having had a disparate impact. See note 19 *supra.* The problem is complicated moreover by the earlier hiring of 84 whites and three minority persons under an ambiguous interim agreement. It may be that some plan which accepts the reduction of the passing mark to six and treats the list as a qualifying list without ranking, subject to passing physical and medical examinations, would, as an interim measure, afford substantial minority representation and be acceptable as part of an overall settlement that the parties may still discover to be the most sensible course of all.

In conclusion, we vacate the order appealing from and remand the case to the district court for further consideration of the matters discussion in this opinion.

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[20]Plaintiffs argue that even a passing score of six still would result in a discriminatory impact in the passing rates. We do not express an opinion on this issue, but merely suggest that the district court might want to explore further the implications of lowering the passing score.

Plaintiffs also point out that lowering the passing score was suggested as a remedy, not as a defense to liability. We have found no authority on whether an employer who selects a cut-off score and defends it until the test has been found not job-related can then avoid the implications of that finding by adjusting the passing score to a point where the disparate impact is arguably insignificant.

APPENDIX D

ASSOCIATION AGAINST DISCRIMINATION IN EMPLOYMENT, INC., Roosevelt Johnson, Craig Kelly, Charles Herd, Robert Lewis, William Cary, Charles R. Young, Herman Agosto, Harmin Linares, Ismael Pamales, Salvador Perez, and on behalf of all others similarly situated, Plaintiffs,

v.

CITY OF BRIDGEPORT, Nicholas Panuzio, Robert W. Weeks, Jr., Edward F. Daley, Julius Nobili, William G. Pjura, Frank J. Deprinzio, Alan Cohen, Bridgeport Civil Service Commission, Charles E. Porzelt, Andrew Gottfried, Salvatore S. Spadaccino, Charles J. Dougiello, John J. Hannon, John F. Gleason, David Sullivan, William D. Miklus, Albert Schwarz, Bridgeport Board of Fire Commissioners, Individually and in their official capacities, Defendants.

Civ. No. B-75-268.

United States District Court,
D. Connecticut.

July 14, 1978.

Class action was brought on behalf of Blacks and Hispanics attacking civil service employment examination administered to candidates for city fire department. Trial was held on liability issue. The District Court, Daly, J., held that: (1) claim that city's federal revenue-sharing funds should be terminated was best considered at the remedy phase; (2) to prevail on claim of disparate impact plaintiffs were not required to demonstrate an intent to discriminate; (3) exam had a disparate impact on minorities where they constituted 41% of the population but only 0.2% of fire department, and (4) exam could not be upheld as job related where, among other things, exam was based only on perfunctory analysis of fire fighter's job ranking, procedure used to distinguish among fire fighters was inadequate and only

explanation for passing score used was arbitrary requirement of city charter.

Judgment for plaintiffs on liability issue.

See also, D.C., 454 F.Supp. 758.

David N. Rosen, New Haven, Conn., Michael P. Koskoff, Bridgeport, Conn., for plaintiffs.

Raymond B. Rubens, Bridgeport, Conn., for defendants.

J. Daniel Sagarin, Bridgeport, Conn., for intervenors.

DALY, District Judge.

RULING ON LIABILITY

Plaintiffs, as representatives of the class of Blacks and Hispanics who reside in the City of Bridgeport, Connecticut, are attacking the 1975 Civil Service Exam administered to candidates for Bridgeport's Fire Department. Defendants are the City of Bridgeport, several of its officials, the Bridgeport Civil Service Commission and the Bridgeport Board of Fire Commissioners. A group of Bridgeport's firefighters, Bridgeport Firefighters for Merit Employment, Inc., have been permitted to intervene to assure that the viewpoints of all interested persons are represented.

This opinion is limited to the question of defendants' liability. After extensive discovery and several pretrial conferences, this Court decided to bifurcate the complex factual claims of liability from the question of the appropriate remedy. The liability aspect of the case has been tried to the Court and carefully briefed in thorough post-trial memoranda. On the basis of the credible evidence, the Court finds that Bridgeport's 1975 firefighters exam had a disparate impact and that this exam was not job-related.

Plaintiff's claim that Title VII of the Civil Rights of 1964, 42 U.S.C. § 2000e, *et seq.*, and the anti-discrimination provision of the Revenue Sharing Act, 31 U.S.C. § 1242(a), have been violated. The violation of Title VII is based on the alternative contentions that plaintiffs have been subjected to disparate treatment and that defendants' firefighters exam had a disparate impact. These two theories of discrimination are well explained by the Supreme Court in *Int'l Brotherhood of Teamsters* v. *United States,* 431 U.S. 324, 335-36 n. 15, 97 S.Ct. 1843, 1854, 52 L.Ed.2d 396 (1977);

> "'Disparate treatment' such as alleged in the present case is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment....
>
> Claims of disparate treatment may be distinguished from claims that stress 'disparate impact.' The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity.... Proof of discriminatory motive, we have held, is not required under a disparate impact theory" (citations omitted). *Id.*

See *Furnco Construction Corp.* v. *Waters,* _____ U.S. _____, _____ _ _____, 98 S.Ct. 2943, 57 L.Ed.2d 957 (1978). Because plaintiffs have demonstrated that the firefighters exam violated the disparate impact theory of Title VII, the Court does not reach the question of whether plaintiffs have been subjected to disparate treatment. Moreover, the Court is reserving judgment on plaintiffs' claim that Bridgeport's federal revenue sharing funds should be terminated. As suggested by intervenors, this claim is best considered subsequently when the Court fashions a remedy for plaintiffs. It should be noted, however, that the Court sees little benefit to plaintiffs in the termination of

federal funding and views such a step as one of last resort. See generally *United States* v. *City of Chicago,* 549 F.2d 415, 449 (7th Cir. 1977).

The legal principles that apply to a claim of disparate impact are well-settled.[1] In *Dothard* v. *Rawlinson,* 433 U.S. 321, 329, 97 S.Ct. 2720, 53 L.Ed.2d 786 (1977) the Supreme Court had occasion to summarize the three-step analysis that governs proof of such Title VII claims. The Court explained that to prevail on the basis of a disparate impact theory plaintiffs must first demonstrate that defendants' use of facially neutral hiring requirements has a significantly disparate impact on plaintiffs. That is, plaintiffs need only prove that defendants' seemingly unbiased hiring standards have resulted in a significant pattern of discriminatory employment. If plaintiffs adduce ample proof of such a discriminatory pattern, they have established a *Prima facie* case of a racially disparate impact and the burden shifts to defendants.[2] See 29 C.F.R. § 1607.3 (1977). In the Second Circuit this shifting of the burden means defendants become saddled not only with the burden of going forward, but also with

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[1]For a list of cases in which written employment examinations are challenged on the basis of a racially disparate impact, see *Bridgeport Guardians* v. *Bridgeport Police Dept.,* 431 F.Supp. 931, 933 (D.Conn. 1977).

[2]Intervenors argue that the analysis outlined in *Dothard* v. *Rawlinson, supra,* is no longer appropriate and that plaintiffs must demonstrate an intent to discriminate in addition to a disparate impact. This contention is meritless. The case upon which intervenors principally rely, *Washington* v. *Davis,* 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976), states that a showing of discriminatory animus is an essential element of discriminatory claims based on equal protection. *Accord, Regents of the University of Calif.* v. *Bakke,* _____ U.S. _____, _____ ___ n. 27, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978); *Chance* v. *Board of Examiners,* 561 F.2d 1079, 1087 (2d Cir. 1977). Plaintiffs' claim, however, is based on Title VII and not equal protection. Therefore, *Washington* v. *Davis, supra,* and its progeny are inapposite.

the burden of persuasion. *Vulcan Soc. of N.Y. City Fire Dept., Inc.* v. *Civil Serv. Comm'n.*, 490 F.2d 387, 393 (2d Cir. 1973). By way of rebuttal, defendants must then demonstrate that their employment requirements are substantially related to job performance. The question whether Bridgeport's firefighters exam was job-related is the critical issue in this case. The third and final step in the analysis is reached only if defendants successfully show that their employment requirements "have a manifest relationship to the employment in question." *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 432, 91 S.Ct. 849, 854, 28 L.Ed.2d 158 (1971). If defendants prove their requirements are job-related, plaintiffs have an opportunity to rejoin by showing that other selection techniques are available which would advance defendants' interests in maintaining high caliber employees, but which would not have a similar discriminatory effect. *Dothard* v. *Rawlinson, supra,* 433 U.S. at 329, 97 S.Ct. 2720; *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 425, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975).

The statistical data presented at trial by plaintiffs leave no doubt that the firefighters exam had a disparate impact on the named plaintiffs and the class of persons they represent. Between the taking of the 1970 census and the 1974 census the minority population in Bridgeport increased from 25.3% to 41%. Of the 153,500 residents of Bridgeport in 1974, 27% were Black and 14% were Hispanics. In marked contrast to the racial composition of the City's population, there was but one minority firefighter in 1975 out of 428 members of the Bridgeport Fire Department. Thus, at the time the firefighters exam was given, minorities constituted 41% of Bridgeport's population, but only 0.2% of its Fire Department.

The firefighters exam did little to alter this imbalance. Only three of the eighty-four candidates who successfully passed the exam were members of minority groups. In terms of the pass rate, minority candidates passed with one-third the frequency of non-minority candidates; a 9% minority pass rate as compared with a 27% nonminority pass rate. In addition, a statistical test performed by plaintiffs' expert revealed that the differ-

ence between the mean exam scores of minority candidates and nonminority candidates could have been the result of chance in less than one in 10,000 samples. Plaintiffs' expert also introduced statistical evidence that demonstrated that the disparity between minority and nonminority performance on the exam was not the result of differences in a candidate's formal education.[3] Assuming that every candidate who passed the firefighters exam is ultimately hired, minorities will constitute something less than 1% of Bridgeport's Fire Department. Therefore, if the results of the exam remain unaltered, the operative effect of the exam will be to perpetuate the composition of an already racially imbalanced fire department. The disparate impact of the firefighters exam, especially when viewed in the light of the Bridgeport Fire Department's prior racial imbalance, compels the conclusion that the exam should be upheld only upon a persuasive showing that it was substantially related to the performance of firefighters.

The most difficult question raised by plaintiff's claim is whether the 1975 exam is job-related. In search of an answer, the attorneys and the Court have been led by the conflicting testimony of two experts, who spoke in an alien tongue, through a labyrinth of statistical analysis that might well have intimidated Odysseus. While the Court does not concur with plaintiffs in all of their criticisms of the exam, it is apparent that the exam suffers from several serious defects.

Before discussing the specific defects in the exam, a brief digression is necessary to explain how the exam was developed. The firefighters exam was the result of a concurrent criteria-related validity study. Such studies begin with the collection of

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[3]In fact, plaintiffs' expert testified that there was an inverse relationship between a candidate's exam score and his formal education. That is, candidates of the same race and comparable age did more poorly on the firefighters exam if they had received some college education. This seemingly anomalous result is most probably the result of the weighing of scores on the PRF Understanding test. See the discussion of this test in the text at 755 *infra*.

data on present employees. These employees are ranked by their superiors and then given a battery of tests that may or may not concern the employee's knowledge of his field. After these tests are scored, a statistical analysis is performed to determine whether the highly ranked employees have performed similarly on any of the tests. If the highly ranked employees uniformly have performed either better or worse than employees with low rankings on any of the tests, then these tests are presumed to identify desirable employees.

In the case of Bridgeport's firefighters exam, data on firefighters in several Connecticut cities were gathered. Statistical analysis of these data revealed that there was a correlation in Bridgeport and Hartford between highly ranked firefighters and their test scores on three of the tests in the test battery.[4] In the case of the FIT Mechanics and the PRF Social Recognition Tests, there was a direct correlation between highly ranked firefighters and high test scores, whereas in the case of the PRF Understanding Test, highly ranked firefighters tended to receive low test scores. These three tests were then administered to the 1975 candidates, and the results were evaluated by weighing positively high scores on the first two tests and weighing negatively high scores on the PRF Understanding Test. Plaintiffs contend that the development of this exam was "shoddy." Although the Court does not agree with this assessment, there were deficiencies in the preparation of the exam and in the selection of a passing score.

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[4]The management consulting firm that developed the exam took the additional step of attempting to eliminate those tests in which there was a significant difference between the scores of Blacks and Whites. While this was a commendable measure, the Court is not persuaded that this additional step made the test unbiased. Of necessity the consulting firm's analysis was based on the evaluation of a small number of Blacks, most if not all of whom had already demonstrated an ability to perform well on civil service exams. In addition, the firm was never told to eliminate tests that had a discriminatory impact on Hispanics.

PREPARATION OF EXAM

Chief among the deficiencies in the exam was its preparation. It would seem that a thorough job analysis would be fundamental to the development of a job-related exam. However, the testimony introduced at trial indicated that the firm which had developed the exam, Hay Associates (Hay), relied on a perfunctory analysis of a firefighter's job. Plaintiffs quite properly note that the insufficient data gathered by Hay concerning job characteristics of a firefighter tainted all subsequent efforts to develop a job-related exam. For example, because a detailed list of critical work behaviors was not developed, the supervisory personnel who ranked the firefighters used only a very generalized list of job qualities. Not only did this list lack specificity, but there was no differentiation between attributes on the basis of their importance. As a result, a supervisor's high ranking of a firefighter for having a good sense of "public relations" had the same effect on a firefighter's score as a high ranking for "composure under pressure." While both attributes are commendable in a firefighter, Hay's methodology provided no means by which their relative importance could be considered.

The Court also finds that the ranking procedure used to distinguish among firefighters was inadequate. Hay had supervisory personnel rank firefighters over whom they had authority in a linear order from best to worst. This technique has several defects when used to evaluate small groups that vary in size. First, it assumes that the best firefighter under one supervisor is better than the second best firefighter under another supervisor. This criticism is particularly important here because all the supervisors were ranking members of small groups; almost one-half of the firefighters were in groups of no more than five and one-quarter were in groups of two or three. The consequence of the ranking procedure is that a firefighter who was the second best out of a group of two was equated with a firefighter who was the second best out of a group of six. The possibility of obtaining valuable data from this ranking procedure is further diminished by the fact that the supervisory personnel who performed the rankings were given insufficient training.

The final deficiency in the exam's preparation concerns the exclusive use of volunteers as a sample group. Plaintiffs' expert testified that complete reliance upon volunteers in a concurrent validity study often results in skewed data. He stated that within his field volunteers are considered a notoriously unrepresentative sample because their motivation tends to differ from the motivation of their peers.

SELECTION OF PASSING EXAM SCORE

Not only is the exam's preparation suspect, but the manner in which it was used is improper. Specifically, plaintiffs and intervenors criticize the passing score as being arbitrary. Although the ultimate effect of the exam turns upon the score used to differentiate between passing and failing scores, Hay did not recommend a passing score. Apparently, this failure was due to the fact that the ranking procedure used in the preparation of the exam provided no information upon which to base such a recommendation. The critical choice of a passing score must be scrutinized with particular care because this decision was in large part responsible for the disparate impact of the exam.[5]

The only explanation given for the passing score used was the arbitrary requirement of Bridgeport's City Charter.[6] See

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[5]The discriminatory impact of the exam would have been significantly alleviated if the passing score had been designated as 6. If this score had been used, 55.2% of the Blacks and 68.6% of the Whites would have passed. Plaintiffs contend that even with an alteration of the passing score, the exam would be discriminatory because only 9.2% of the total number of candidates to pass would be members of minority groups. The force of this contention is weakened by the fact that only 10.9% of those who applied to take the firefighters exam were members of minority groups.

[6]The uncontroverted testimony at trial revealed that the passing score used by Bridgeport was selected because the City Charter requires candidates to answer correctly at least 75% of all questions on civil service exams. Since such a requirement was meaningless on the test battery developed by Hay, Bridgeport used the seventy-five percentile marks

Bridgeport Guardians, Inc. v. *Bridgeport Civil Serv. Comm'n,* 482 F.2d 1333, 1338 (2nd Cir. 1973). Unlike the passing score used in the detective exam that was upheld in *Bridgeport Guardians* v. *Bridgeport Police Dept.,* 431 F.Supp. 931 (D.Conn. 1977) (*Guardians II*), the passing score for the firefighters exam bore no relation to "normal expectations of proficiency." 29 C.F.R. § 1607.6 (1977). In *Guardian II,* the Court found that the test had been designed so that a successful candidate would have had to obtain a higher score on the exam than had been obtained by most other candidates who had previously taken the same test. In contrast to the firefighters exam, the detective exam challenged in *Guardians II* had been planned so that the passing score mandated by Bridgeport's Charter would reflect a determination of desired proficiency. The fact that the passing score was not "based on sufficiently sound approach," *Guardians II,* 431 F.Supp. at 490, is itself ample reason in this case to conclude that the exam was not job-related.

Having determined that the exam was not sufficiently job-related, the inquiry could end without considering whether a better examination is available. However, the Court feels that it should address defendants' repeated protestations that it is being required to do the impossible — to devise a perfect exam. While the Court finds that Bridgeport is making advances in its employment practices, it cannot be said that the City has done all that is within its power to obtain highly qualified minority firefighters.

The firefighters exam represented a decided improvement over some of the earlier civil service exams employed by Bridgeport. See, e.g., *Bridgeport Guardians, Inc.* v. *Bridgeport Civil Serv. Comm'n, supra.* Furthermore, based on the evidence before the Court, there appears to be no bad faith on the part of

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as the passing score. The selection of this passing score automatically meant that 75% of the candidates who took the exam would fail. In its brief, Bridgeport quite properly concedes that there is no statistical relation between the passing score required by its Charter and the passing score it used in the firefighters exam.

defendants in using the exam or in selecting the respected management consulting firm of Hay to develop the exam. Defendants made a substantial effort to obtain an exam that would withstand judicial scrutiny. Over a period of one and one-half years some 2745 man-hours were spent in the development of the exam at a cost of approximately $100,000 in federal funds. It should also be noted that the use of written civil service exams as the critical component of the hiring process is itself an important improvement over the political spoils system that had long been employed in many municipalities.

However, the Court finds that defendants' recruiting efforts were unsatisfactory. Until quite recently Bridgeport's Fire Department had only one black officer and two black firefighters. Not surprisingly, the City's reputation for hiring minority firemen was deplorable. Little was done to overcome this reputation. The credible evidence indicated that Bridgeport used only one of three local radio stations to advertise the firefighters exam. And, although some recruiting of minority candidates was done, these efforts were neither initiated nor sponsored by Bridgeport.[7] Thus, only 10.9% of those who applied to take the firefighters exam were members of the minority groups while 41% of the total population were members of minority groups.

The Court also believes that defendants have not considered all plausible alternatives for distinguishing qualified from unqualified firefighter candidates. The underlying issues in all cases involving employment examinations is what constitutes a "qualified" employee, and how can he or she be identified in an unbiased and culturally neutral manner. The three-step analysis used to evaluate plaintiffs' disparate impact claim is merely an orderly method of assuring that potential employees are afforded an equal opportunity and that employers are permitted to maintain the caliber of employee that they desire. The

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[7]It bears mentioning that those who had worked conscientiously to recruit minority candidates felt that their credibility was all but destroyed by the firefighters exam.

firefighters exam represents but one unsuccessful attempt at developing a workable method of accomplishing these objectives. The possible solutions to this problem are subject to more hypotheses than either party has suggested.[8]

CONCLUSION

Defendants have not sustained their burden of proving that the exam was job-related. There are numerous defects in the exam's preparation, and the record is devoid of evidence that the passing score was designed to reflect a proficiency determination. The aggregate effect of these deficiencies compels the conclusion that the 1975 firefighter exam violated Title VII and must not be used in the future. A hearing has been scheduled for July 20, 1978 in order to develop remaining questions concerning an appropriate remedy.

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[8]For example, it does not seem axiomatic to the Court that multiple-choice tests must be the critical component of a process aimed at identifying qualified firefighters. While this type of test has demonstrated some ability to "predict" subsequent performance of individuals on other written exams, it does not follow that multiple-choice exams are adequate to predict all types of human behavior. In fact, the repeated failure of civil service exams to qualify as job-related, see note 1, suggests that these tests are inadequate to the task of predicting complex patterns of behavior (e.g., those behaviors which would distinguish an average firefighter from an exceptional firefighter). The Court also finds it peculiar that exams, such as the firefighters exam, tend to place so little emphasis on physical ability. It would seem that the physical ability necessary for a qualified firefighter is neither more difficult to identify or more complicated to measure than the intelligence level of a qualified firefighter.

APPENDIX E

ASSOCIATION AGAINST DISCRIMINATION IN EMPLOYMENT, INC., Roosevelt Johnson, Craig Kelly, Charles Herd, Robert Lewis, William Cary, Charles R. Young, Herman Agosto, Harmin Linares, Ismael Pomales, Salvador Perez, Individually and on behalf of all others similarly situated, Plaintiffs.

v.

Robert W. WEEKS, Jr., Edward F. Daly, Julius Nobile, William G. Pjura, Frank J. Prinzio, Bridgeport Civil Service Commission, Alan Cohen, Charles E. Porvelt, Andrew Gottfried, Salvatore S. Spudaccino, Charles J. Dougiello, John J. Hannon, Bridgeport Board of Fire Commissioners, John F. Gleason, John Mandanici, and City of Bridgeport, all individually and in their official capacities, Defendants.

Civ. A. No. B-75-268.

United States District Court,
D. Connecticut.

July 31, 1978.

Addendum To Remedy Order

Sept. 18, 1978.

After deciding that a city's fire fighters' examination violated Title VII of the Civil Rights Act of 1964, the District Court, Daly, J., entered an order detailing the remedy mandated by that statute.

Order entered.

See also, D.C., 454 F.Supp.751.

David N. Rosen, New Haven, Conn., Michael P. Koskoff, Bridgeport, Conn., for plaintiffs.

J. Daniel Sagarin, Bridgeport, Conn., for intervenors.

Raymond B. Rubens, Bridgeport, Conn., for defendants.

REMEDY ORDER

DALY, District Judge.

In an earlier decision filed on July 14, 1978, this Court ruled that the City of Bridgeport's 1975 firefighters exam violated Title VII, 42 U.S.C. §200e *et seq.* Since this ruling the Court has held a hearing, conducted several chambers conferences and requested briefs in an effort to fashion an appropriate remedy.[1] This order details the remedy mandated by Title VII and the body of caselaw that it has generated.

The fashioning of a remedy must begin with the premise that the firefighters exam administered in 1975 did not distinguish qualified from unqualified applicants. As the Court explained in its ruling on liability, the exam was not job-related. Moreover, the testimony of Bridgeport's Fire Chief at the remedy hearing indicated that there might be an inverse correlation between those who passed the exam and those who are most qualified to be firefighters. The Chief stated that the two most important attributes of a firefighter are superior physical ability and intelligence. Yet, the evaluation of firefighter applicants placed little weight on physical ability and weighed negatively high scores on an understanding test. Bridgeport's hiring process in 1975 merely required applicants to complete a pass/

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[1]Much to the Court's chagrin, the defendant City of Bridgeport did not submit a brief on the remedy aspect of this case. To a certain extent, the disadvantage at which the Court was put by this failure was offset by the superb brief filed by counsel for plaintiffs.

fail physical agility test. In addition, the written examination penalized those who indicated that they were "inquiring, curious, analytic, exploring, intellectual, reflective, incisive, investigative, probing, logical, scrutinizing, theoretical, astute, rational [and] inquisitive."[2] Therefore, not only was the written exam not job related, but the City's hiring process did not require successful applicants to demonstrate those attributes which the Fire Chief said were essential for firefighters.

Because of the City's ongoing need for firefighters, eighty-four men who passed the written exam, as well as the agility test and the medical examination, have been hired.[3] As should be apparent from what has already been said, these men have not demonstrated that they are intellectually more qualified to be firefighters than the applicants who failed. Moreover, since testimony at the remedy hearing indicated that these eighty-four men are performing their duties adequately, it is fair to assume that all of the applicants who are able to pass the same agility test and medical examination will be capable of performing at least as well as the eighty-four men already hired.

The following order is directed at remedying the disparate impact of the firefighters exam by placing those frustrated applicants on a parity with the eighty-four men who have been hired. Therefore, it is ORDERED that:

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[2]These are the characteristics that the PRF Understanding Test is designed to identify. As noted in the Court's earlier ruling on liability, the fact that applicants of the same race and of comparable age obtained lower exam scores if they had received some college education may well be the result of the way the PRF Understanding Test scores were weighed.

[3]In 1976 Judge Newman permitted the City to hire forty firefighters, and in 1977 Judge Zampano permitted the hiring of an additional forty-four firefighters.

A. OLD EXAM

The test battery given as a written exam in 1975 to firefighter candidates shall never be used again;

B. HIRING

1. The City of Bridgeport shall promptly hire the Blacks and Hispanics who filed applications with the civil service office for the 1975 firefighters exam and who pass both the agility Test and the medical examination to be administered by the City. Said agility test and medical examination shall be no more rigorous than the test and examination administered to the eighty-four firefighters already hired.

The agility test and the medical examination shall be given within 120 days of this order and shall be preceded by both published notice and individual written notice to each of those Blacks and Hispanics who filed applications for the 1975 firefighters exam. Notwithstanding the above, the City is not obligated to hire anyone who:

(a) was not eighteen years of age on or before the day of exam (February 21, 1975);

(b) had not graduated from high school or earned a high school equivalency certification as of the day of the exam;

(c) did not possess a valid motor vehicle license for the State of Connecticut as of the day of the exam;

(d) does not presently possess a valid Connecticut motor vehicle license;

(e) was not a bona fide resident of Bridgeport from March 22, 1974 to March 22, 1975; or

(f) has not been a bona fide resident of Bridgeport for the past year.

2. Thereafter, in making appointments to the rank of firefighter, the City shall assemble a pool of Black and Hispanic candidates qualified for the position (hereinafter "the minority pool") and shall make appointments and promotions from such pool as follows:

(a) Until the number of minority candidates hired by the Bridgeport Fire Department since 1975 equals the number of White candidates hired since 1975, all current and future vacancies in the rank of Firefighter shall be filled from the minority pool, unless the hiring mandated by paragraph B(1) results in the hiring of minority candidates equal to the number of White candidates hired since 1975;

(b) Thereafter, until the number of minority persons working in the Bridgeport Fire Department at the rank of Firefighter or above equals 125, one half of all vacancies shall be filled from the minority pool. Such vacancies shall be filled by making appointments of candidates from the minority pool alternately with appointments of candidates not from this pool;

(c) Variation from the hiring formulas set forth above will be permitted only upon a showing made to the Court of either unavailability of qualified Black and Hispanic candidates or other good cause.

3. Criteria and procedures to be used in determining qualification for the minority pool and plans for recruiting qualified candidates for the minority pool shall be submitted to the court for review and approval before being used. Exemption from state and local restrictions will be approved where necessary to effectuate this decree.

4. Subsequent appointments to the rank of Firefighter shall be made in strict accordance with Bridgeport's affirmative action plan and Title VII of the Civil Rights Act of 1964.

5. This Court shall retain jurisdiction over this case until the provisions of this order have been complied with, and any entrance criterion to the job of Firefighter which the defendants propose to use togehter with the use to be made of its results shall, prior to use, be submitted to the Court for review and approval together with satisfactory evidence that the proposed criterion will not result in a disparate impact upon Blacks and Hispanics.

C. SENIORITY

1. Each of the persons hired pursuant to paragraph B(1) shall be granted the same seniority as the twenty-one firefighters appointed on October, 1976.

2. In order to put all of the 1975 firefighter candidates on a parity, the City is prohibited from giving any promotional exams for firefighters until such time as all the firefighters hired pursuant to B(1) shall be qualified to take the promotional exam. Although the Court is specifically declining to alter the three year time-in-grade requirement that now exists for firefighters who wish to take the promotional exam for the positions of Pump Engineer and Lieutenant, the Court is not opposed to a reduction of this requirement. The plausibility of reducing the time-in-grade requirement by establishing an improved training program for all firefighters involves a decision that must be left to the experienced judgment of the authorities in the Fire Department. Until such time as promotional examinations are administered, the City of Bridgeport may fill promotional vacancies on an acting or provisional basis, except that acting or provisional supervisors shall not be given any preference in the selection of permanent supervisors. In selecting acting or provisional supervisors, the City is urged to take cognizance of the prior firefighting experience of a number of the plaintiffs.

D. BACKPAY

Each of the persons hired pursuant to paragraph B(1) is entitled to backpay. For the purposes of this order backpay shall include:

(a) the sum of the value of all regular and overtime wages, fringe benefits, pension benefits, and all other benefits to which firefighters are entitled under applicable union contracts, including all increments, together with interest and "frontpay" for presently qualified candidates until the date of hire;

(b) reduced by the sum of amounts earned or earnable with reasonable diligence and amounts of any welfare or unemployment compensation received.

E. SPECIAL MASTER

The Court has had the good fortune to obtain the assistance of David S. Maclay, Esquire, of Westport, Connecticut, a member of the bar of this Court, as a special master. The special master shall oversee the implementation of this order. It shall be his duty to hear individual claims in order to determine those persons entitled to be hired under paragraph B(1), and to compute the backpay to which these persons are entitled. The special master shall file a final report with this Court and may file such interim reports from time to time as he shall deem advisable. The special master shall be entitled to reasonable compensation for his services.

F. COSTS AND ATTORNEYS' FEES

Plaintiffs are hereby ordered to be entitled to their court costs and reasonable attorneys' fees to date. The amount of such costs and fees shall be set by the court after a hearing, to be held on September 15, 1978. Costs and attorneys' fees for work done in the future shall be fixed in such manner as the Court may determine.

ADDENDUM TO REMEDY ORDER.

The defendant City of Bridgeport has requested a partial clarification of the July 31st Remedy Order, while that Order requires the City of Bridgeport within 120 days of its effective date to administer agility tests and medical examinations to all members of the class of plaintiffs not excluded by the conditions enumerated in the Order, and within 120 days to hire, in the sense of placing on the payroll, all who pass these tests, the Remedy Order does not require that all these people be placed on duty as firefighters at one time. Rather, the Order contemplated that these people would be placed on actual duty within a reasonable time in accordance with the Department's capacity to train new firefighters.